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Supreme Court, U.S.
FILED

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No. _____ OFFICE OF THE CLERK

In The
Supreme Court of the United States

Montana Rail Link, Inc.,
Petitioner,

v.

Robert R. Watts, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the
Supreme Court of Montana

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the test for determining "employment" under the Federal Employers' Liability Act [45 U.S.C. § 51 (1939)] should be judicially expanded to include the distinct congressional standard utilized for establishing "employment" under the Railroad Retirement Act [45 U.S.C. § 231 (1976)].

PARTIES TO THE PROCEEDING

This Petition for Certiorari is filed on behalf of Montana Rail Link, Inc., which is the Defendant/Appellee in six separate cases consolidated before the Sixth Judicial District Court in Park County, Montana and appealed to the Montana Supreme Court. Livingston Rebuild Center, Inc. is a Defendant/Appellee in the state court action.

The following six individuals are Respondents herein, and are the Plaintiffs/Appellants in the state court action:

Robert R. Watts, Danial K. Newman, Paul F. Nardella, Dennis A. Thorson, Danna Parrow and Jack Lowe.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Montana Rail Link, Inc. respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Montana in *Robert R. Watts v. Montana Rail Link, Inc.*, published at 975 P.2d 283 (Mont. 1999).

OPINION BELOW

The February 8, 1999 opinion of the Montana Supreme Court is reported at 975 P.2d 283, and is reprinted in Appendix 1 to this Petition. Montana Rail Link's Petition for Rehearing was denied on April 22, 1999 and is reprinted at Appendix 2 to this Petition.

STATEMENT OF JURISDICTION

Plaintiffs (Respondents herein) filed complaints in the District Court for the Sixth Judicial District in Park County, Montana, in which they named Livingston Rebuild Center, Inc. (hereinafter "LRC") and Petitioner Montana Rail Link, Inc., (hereinafter "MRL") as defendants, seeking damages pursuant to the FELA, 45 U.S.C. §§ 51-60 (1939). The District Court entered judgment in favor of MRL on September 30, 1993 and is reprinted as Appendix 3 to this Petition.

The decision of the Montana Supreme Court was entered on February 8, 1999. On April 22, 1999, the Montana Supreme Court denied MRL's Petition for Rehearing.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTES INVOLVED

The FELA is codified at 45 U.S.C. § 51-60. 45 U.S.C. § 51 of the Act provides in pertinent part:

Every common carrier by railroad while engaging in commerce between any of the several states...shall be

liable in damages to any person suffering injury while he is employed by such carrier in such commerce...

The Railroad Retirement Act is codified at 45 U.S.C. § 231, specifically (a)(1)(ii) of that Act provides:

> For the purposes of this Act—
>
> (a)(1) The term "employer" shall include—
>
> (ii) any company which is directly or indirectly owned or controlled by, or under common control with, one or more employers as defined in paragraph (i) of this subdivision, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad.

STATEMENT OF THE CASE

In 1987 the Burlington Northern Railroad sold its railroad line between Laurel, Montana and Sandpoint, Idaho to Montana Rail Link, Inc. ("MRL").

On January 4, 1988, the Livingston Rebuild Center ("LRC") was incorporated under the laws of the state of Montana. In June 1988, LRC began its operations as an independent remanufacturing business at the Livingston yard in Livingston, Montana, which property was previously a part of Burlington Northern's operations. LRC was incorporated to operate as a contract repair facility, or "back shop" for refurbishing and repairing locomotives. At the time LRC was incorporated by some, but not all of the MRL shareholders.

No other remanufacturing companies in the United States were subject to liability under the FELA. [Tr. p. 1725, lines 5-14, p. 1726, lines 9-25, p. 1727, lines 1-15].

The Livingston yard had historically been used by the Burlington Northern for "running repairs" and for heavy repair or "back shop" work. The facility had been closed for several years prior to the commencement of LRC's operations in June 1988. MRL was not interested in obtaining, refurbishing or operating Burlington Northern's back shop facilities since MRL's business plan was to operate a railroad and not a contract repair facility. [Tr. p. 1554, lines 1-11, p. 1572, lines 3-25; p. 1959, lines 4-16]. As a practical matter, MRL also could not sustain a "back shop" operation because of its small fleet of only 54 locomotives at its inception. In fact, the Burlington Northern's Livingston back shops were not economically viable even with its fleet of some 200 locomotives.

LRC furnished services to numerous customers, including MRL, Burlington Northern, GMC, Helm, Cryoshield, Maryland Midland, Oxford Leasing, Kansas City Southern, Wisconsin Central and GTAX. [Tr. p. 207, line 1 through p. 209, line 2]. Services contracted for by MRL required LRC to win a competitive bid. [Tr. p. 1043, lines 3-25, p. 1044, lines 1-11]. The percentage of MRL revenues devoted to remanufacturing of MRL's locomotive fleet was zero in 1987 and 1988, 1.1663% in 1989, 1.51% in 1990, .3569% in 1991 and zero in 1992. *[See MRL's Trial Exhibit "II"].*

In 1989, LRC was found to be an employer within the meaning of the Railroad Retirement Act [45 U.S.C. § 231(a)(1)(1976)]. The finding that LRC was an "employer" under the Railroad Retirement Act ("RRA") was based upon a finding of "common control" since Dennis Washington was the majority shareholder of both LRC and MRL and the two companies had similar, although not identical, shareholders. The finding that LRC

was subject to the RRA was upheld in *Livingston Rebuild Center, Inc. v. R.R. Retirement Bd.*, 970 F.2d 295 (7th Cir. 1992). In these proceedings, the Montana Supreme Court held that the Railroad Retirement Board's ("RRB") ruling that LRC was under the "control" of MRL under 45 U.S.C. § 231(a)(1) [the RRA] was probative of the issue of whether the LRC employees were employees of MRL under the FELA. *[See App. 1, ¶s 29-33].*

The plaintiffs subsequently filed lawsuits against LRC and MRL in Montana state district court seeking damages under the FELA on the theory that LRC was a railroad or alternatively that they were employees of MRL. The claims were ultimately consolidated for purposes of determining whether the Court had jurisdiction under the FELA. Plaintiffs testified that they had been hired by and worked for LRC and not MRL. They also each acknowledged that their schedules were set by LRC, and that they could only be hired, fired and disciplined by LRC. [Tr. p. 374, lines 9-21, p. 248, lines 7-19]. Each of the Plaintiffs applied for state workers' compensation benefits and uniformly identified LRC as their employer to obtain such benefits. *[See MRL's Trial Exhibits "E(1)" and "F(1)"].*

The trial court, sitting without a jury, entered exhaustive findings of fact that LRC and MRL are separate, independent corporations with an arms-length customer relationship and ruled that LRC employees were not covered under the FELA. The Montana Supreme Court reversed the trial court, finding that the RRB's decision that LRC was an employer subject to the Railroad Retirement Act was probative for determining coverage under the FELA. Citing the RRB's decision, the court set aside the arms-length customer relationship and extended coverage under the FELA to LRC employees.

MRL now seeks this Court's review in determining whether the test for determining "employment" under the

FELA should be judicially expanded to include the distinct congressional standard utilized for establishing "employment" under the Railroad Retirement Act.

REASONS FOR GRANTING THE PETITION

I. THE MONTANA SUPREME COURT'S RELIANCE ON THE RAILROAD RETIREMENT BOARD'S DECISION TO DETERMINE COVERAGE UNDER THE FELA IS IN CONFLICT WITH THIS COURT'S DECISION IN *EDWARDS v. PACIFIC FRUIT EXPRESS CO.*, 390 U.S. 538 (1968).

To prove liability under the FELA, a plaintiff must establish the following four elements: (1) the defendant is a common carrier; (2) the plaintiff was employed by the defendant; (3) the plaintiff's injury occurred while employed by the defendant; and (4) the defendant's negligence caused plaintiff's injuries. *See Felton v. Southeastern Penn. Transp. Auth.*, 952 F.2d 59, 62 (3rd Cir. 1991). The specific issue before the trial court and the Montana Supreme Court was whether employees of LRC were employees of MRL for purposes of coverage under the FELA.

A. The seminal case for determining "employment" under the FELA is *Kelley v. Southern Pacific Company*, 419 U.S. 318, 324 (1975).

In *Kelley*, this Court set forth three methods by which a plaintiff can establish 'employment' with a rail carrier for FELA purposes even while he is nominally employed by

another. First, the employee could be serving as the borrowed servant of the railroad at the time of his injury. *Id.* Second, he could be deemed to be acting for two masters simultaneously. *Id.* Finally, he could be a subservant of a company that was in turn a servant of a railroad. *Id.*

This Court requires more than a finding of a traditional agency relationship to satisfy the "while employed" clause of the FELA. *Id.* at 323. The historical standard has been proof of a master-servant relationship between the plaintiff and the defendant railroad. *Id.* In *Kelley*, this Court cited with approval Restatement Second of Agency § 220(2) for the factors helpful in determining whether a master-servant relationship exists. In analyzing the factors from § 220(2) for determining the existence of a subservant relationship, this Court concluded that the "control or right to control test would be met only if it were shown that the role of the second company was that of a conventional commonlaw subservant." *Id.* at 326.

In *Kelley*, the putative employee worked eight years for the Pacific Motor Trucking Co., a wholly owned subsidiary of the Southern Pacific Co. At the time of his injury, Kelley was unhooking automobiles from Southern Pacific's 'trilevel' auto-carrying flatcars. *Id.* at 321. Kelley alleged in his complaint that he was employed by the Southern Pacific railroad within the meaning of the FELA. *Id.* This Court reviewed the facts and found that the two companies were sufficiently distinct in organization and responsibility and that there was no apparent overlap in supervisory ranks. Importantly, there was no evidence that Southern Pacific's employees played a significant supervisory role in the unloading operation or that Kelley was being supervised by Southern Pacific employees at the time of his injury. *Id.* at 327.

This Court remanded the *Kelley* case to the District Court with instructions to apply the three-part test set forth

by this Court for determining whether the plaintiff was 'employed' by the railroad for purposes of FELA coverage. In reaching its conclusion, this Court cited with approval language from its earlier decision in *Standard Oil Co. v. Anderson*, 212 U.S. 215, 222 (1909) in which it emphasized the "importance of distinguishing between 'authoritative direction and control, and mere suggestion as to details or the necessary cooperation, where the work furnished is part of a larger undertaking.'" *Id.* at 329.

The Montana Supreme Court applied the third part of the *Kelley* test and found that the employees were subservants of LRC which was, in turn, a servant of MRL. The court reversed the trial court's finding that MRL and LRC were independent corporations that maintained an arms-length customer relationship and instead held that the employees of LRC were 'employed' by MRL for purposes of FELA coverage.

B. The state court's reliance on the RRB's decision in determining the scope of FELA coverage conflicts with this Court's holding in *Edwards*, 390 U.S. 538.

In reaching its conclusion that LRC was a "dependent" corporation, the Montana Supreme Court relied on the Railroad Retirement Board's ("RRB") decision that LRC was an employer within the meaning of the Railroad Retirement Act ("RRA"). *See Livingston Rebuild Center, Inc. v. R.R. Retirement Bd.*, 970 F.2d 295 (7th Cir. 1992). In that decision, the Seventh Circuit cited the RRB's conclusion that "the Center is an 'employer' under the statutes [RRA] it administers because Dennis Washington, its principal investor, also is the controlling shareholder of Montana Rail Link..." *Id.* at 296. That court further noted that approximately 25% of LRC's business came from MRL and that the Center was "not a captive in the sense

that it is devoted predominantly to one railroad's needs..." *Id.*

The Montana Supreme Court then applied the RRB and the Seventh Circuit's upholding of that decision and judicially expanded, without any precedential support, the scope of FELA coverage to the same breadth of coverage which is congressionally established in the Railroad Retirement Act. However, as the Seventh Circuit noted in the *Livingston Rebuild Center* decision, "Congress defined a covered 'employer' broadly [under the RRA], including not only freight and passenger carriers but also 'any company which is directly or indirectly owned or controlled by, or under common control with, one or more [railroads] ..." *Id.* at 295. This Court should grant certiorari to review whether the scope of FELA coverage should be expanded to equal the broadly mandated scope of the RRA.

The Montana Supreme Court's reliance on the RRB's decision in determining whether the plaintiffs were "employees" under the FELA conflicts with this Court's holding in *Edwards*, 390 U.S. 538. In *Edwards*, defendant Pacific Fruit Express Company was subject to the RRA, however, this Court held that refrigerator car companies were specifically excluded from the terms of the FELA. *Id.* at 541. Consequently, the fact that the company was subject to the RRA was *not* found to be "probative" in any way when determining whether the company was an "employer" under the FELA. The Montana Supreme Court's reliance on the RRB's decision to determine the scope of FELA coverage thus stands in direct conflict with the *Edwards* decision.

II. THE MONTANA SUPREME COURT'S RELIANCE ON THE RAILROAD RETIREMENT BOARD'S DECISION TO DETERMINE COVERAGE UNDER THE FELA IS IN

CONFLICT WITH FEDERAL COURT DECISIONS HOLDING THAT THE BOARD'S FINDINGS ARE IRRELEVANT IN DETERMINING "EMPLOYMENT" UNDER 45 U.S.C. § 51.

The Montana Supreme Court's decision also conflicts with the federal district court's decision in *Griffin v. CSX Transportation, Inc.*, 1996 WL 535085 *2 (N.D. Ill. 1996) where the court held that evidence of the RRB's decision or that a company is subject to the RRA is "irrelevant" to the issue of determining "employment" under the FELA. While the *Griffin* Court correctly cited *Kelley* for the standard for determining employment under the FELA, it specifically held that evidence concerning Griffin's railroad retirement withholding was irrelevant to determining employment under the FELA. *Id.*

In *Carey v. CSX Transportation, Inc.*, 1995 WL 251145 *1, *2 (D. Md. 1995), plaintiff's employer CCSI was a wholly owned subsidiary of CSX Tech, which in turn was a wholly owned subsidiary of CSX Corporation. Plaintiff asserted that the fact that CCSI was required to make contributions under the RRA was evidence that she was in reality employed by CSX railroad for purposes of the FELA. The court opined that while the issue of RRB was "not unimportant," that fact *did not* address the core issue which governs determinations of FELA coverage. *Id.* at *2. The Montana Supreme Court's decision conflicts with *Carey* because the court did consider the RRB's decision as "probative" of the core issue governing determination of FELA coverage. Accordingly, this Court should grant certiorari to review whether the test for determining "employment" under the FELA for employees of a non-railroad entity owned by shareholders of a railroad should be judicially expanded to include the separate

congressional standard utilized for determining "employment" under the Railroad Retirement Act.

The federal district court in *Brankin v. CSX Transportation, Inc.*, 1996 WL 627625 (N.D. Ill. 1996), reached a similar conclusion as the *Carey* court. Brankin argued that CSXT's withholding of RRB taxes was evidence of his employment with CSX under the FELA. *Id.* at *4. However, the court ruled that CSXT's withholding of RRB taxes is not evidence which establishes the right to control for purposes of determining FELA coverage. *Id.* at *5. Importantly, the court correctly noted that the Railroad Retirement Act applies to *any company* under common ownership with a railroad and thus requires both railroad and non-railroad employees to pay railroad retirement taxes. *Id.* (Citing 45 U.S.C. § 231(a)(1)(ii) and *Edwards*, 390 U.S. 538 (1968)).

Furthermore, the Montana Supreme Court's adoption of the RRB's decision as "probative" evidence for determining FELA coverage conflicts with the Fourth Circuit's opinion in *Dixon v. CSX Transportation, Inc.*, 990 F.2d 1440 (4th Cir. 1993). The Plaintiff in *Dixon* introduced evidence that he was covered under the RRA and Railroad Unemployment Insurance. *Id.* at 1444. The Fourth Circuit, however, never addressed the issue of the RRB coverage in reaching its conclusion that Dixon was not employed by CSX at the time of the accident in question. *Id.* at 1448. The fact that the court *did not consider* evidence of Dixon's RRB coverage in reaching its decision highlights that the Montana Supreme Court's use of the RRB's decision as "probative" in determining the identical issue directly and irreconcilably conflicts with the Fourth Circuit Court of Appeals.

In addition to the clear conflict with the federal courts on the same issue, the Montana Supreme Court's adoption of the RRB's decision for determining employment under the FELA versus the standard evinced by this Court in

Kelley clearly broadens the scope of FELA coverage and makes every company that is obligated to pay benefits under the RRA subject to liability under the FELA regardless of whether the company is engaged in interstate commerce or a common carrier by rail under 45 U.S.C. § 51. The importance of uniformity in the test for determining who is covered under the FELA presents the special and important reason for the Court to grant the Petition. This Court should therefore grant certiorari to determine whether the RRB's decisions concerning employment under the RRA should be added to the test for determining employment under the FELA.

III. THE PRACTICAL EFFECT OF THE MONTANA SUPREME COURT'S RULING WARRANTS GRANTING CERTIORARI TO AVOID EXPANSION OF FELA COVERAGE BEYOND ITS CONGRESSIONAL MANDATE.

The practical effect of the Montana Supreme Court's ruling is that the parent company of every wholly owned subsidiary of a railroad, or company with common shareholders of a railroad, is now exposed to FELA liability for the employees of its non-railroad subsidiaries. The Montana Supreme Court appropriated a finding of "employment" under the Railroad Retirement Act, and applied that finding to a determination of "employment" under the FELA which resulted in an unprecedented expansion of FELA coverage. The result of the court's use of the RRA finding in the context of the FELA is to potentially subject every railroad in America with wholly owned subsidiaries to a plethora of FELA lawsuits from employees who are otherwise covered under their states' respective workers' compensation acts.

The Montana Supreme Court's decision is not based upon findings that the LRC employees' work was

controlled by MRL at the time of their injuries, or that their injuries even related to MRL projects. The trial record has a dearth of employment related control inferences. Rather, the Montana Supreme Court's decision is based primarily on common stock ownership.

The Montana Supreme Court's use of the RRB's decision and the injection of the standard for determining "employer" under the Railroad Retirement Act significantly expands the test for FELA coverage enunciated by this Court in *Kelley*. Therefore, in addition to exposing parent companies to FELA litigation which previously did not exist, the court's decision broadens the test for FELA coverage beyond that established by this Court. Certiorari is warranted to determine whether the scope of FELA coverage should be extended since:

> One of the purposes of the Federal Employers' Liability Act was to "create uniformity throughout the Union" with respect to railroads' financial responsibility for injuries to their employees.

Norfolk & Western Ry. Co. v. Liepelt, 444 U.S. 490, 493 n.5 (1980).

Public policy considerations also weigh heavily in favor of granting this petition for certiorari. Railroad companies and non-railroad entities alike throughout the United States rely upon the distinct standards for determining employment under the Railroad Retirement Act versus the FELA. However, if the Montana Supreme Court's decision stands uncorrected, the distinction between the two Acts is both eroded and blurred, thus creating additional exposure to railroad companies whose subsidiary corporation employees are currently covered by state workers' compensation acts.

MRL submits that this Court should be alert to extending a statute applicable to railroad employees engaged in interstate transportation to cover employees of non-railroad entities. Such an extension of the FELA based

upon a finding that a company is subject to the Railroad Retirement Act may only serve to deprive injured workers of their rights under a state compensation act where their right of recovery does not depend on proof of negligence. *See Turpin v. Chicago, Burlington & Quincy R.R. Co.*, 403 S.W.2d 233, 240 (Mo. 1966).

Finally, the Montana Supreme Court's improper use of the Railroad Retirement Act standard was recognized in the dissenting opinion signed by the Chief Justice Turnage and Justice Gray:

> [The Montana Supreme] Court attempts to buttress its opinion by the suggestion that the "common consideration of 'control'" contained in the non-applicable definition (of the RRA) is somehow relevant here. A comparison of the definition of control contained in the Railroad Retirement Act with the criteria contained in § 220 (2) of the Restatement (Second) of Agency reflects that the "control" elements are, indeed, significantly different. **Thus, the Court's inclusion of the opinion rendered by the Deputy General Counsel for the Railroad Retirement Board – in a different proceeding under a different definitional standard – that the LRC "is under common control with one or more railroad employers" *has no bearing here, either legally or factually.*** [See Appendix 1, ¶ 72]

CONCLUSION

Certiorari should be granted to resolve the conflict in determining the scope of FELA coverage between the

Montana Supreme Court and this Court and the federal courts deciding the same issue.

Respectfully submitted,

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No. 94-039

IN THE SUPREME COURT OF THE STATE OF MONTANA

1999 MT 18

ROBERT R. WATTS, DANIAL K. NEWMAN, PAUL F. NARDELLA, DENNIS A. THORSON, DANNA PARROW, and JACK LOWE,

Plaintiffs and Appellants,

v.

MONTANA RAIL LINK, INC., a Montana corporation, and LIVINGSTON REBUILD CENTER, INC., a Montana corporation,

Defendants and Respondents.

Filed February 8, 1999

Ed Smith, CLERK OF THE SUPREME COURT, STATE OF MONTANA

APPEAL FROM: District Court of the Sixth Judicial District, In and for the County of Park,The Honorable Kenneth R. Wilson, Judge presiding.

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For Respondents:

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Argued:	June 10, 1997
Submitted:	June 12, 1997
Decided:	February 8, 1999

Filed: Ed Smith, Clerk

Justice Terry N. Trieweiler delivered the opinion of the Court.

¶1 Plaintiffs filed complaints in the District Court for the Sixth Judicial District in Park County in which they named the Livingston Rebuild Center, Inc. (LRC), and Montana Rail Link, Inc. (MRL), as defendants and sought damages pursuant to the Federal Employers Liability Act (FELA) found at 45 U.S.C. §§ 51 to 60. They allege that they were injured during the course of their employment while nominally employed by LRC, but that LRC was actually the servant of MRL, which engaged in the business of common carrier by railroad in interstate commerce. The plaintiffs sought damages from the defendants, MRL and LRC, for their injuries. The defendants denied the material allegations of the plaintiffs' complaint and alleged, among other affirmative defenses, that the plaintiffs could not recover FELA benefits against LRC because it is not a railroad, and that they could not recover FELA benefits against MRL because they were not employed by MRL. Pursuant to the motion of MRL, these cases were consolidated for the sole purpose of determining whether the plaintiffs were covered by FELA. Following a nonjury trial, the District Court found that they were not employed by MRL and entered judgment for the defendants. Plaintiffs appeal from the judgment of the District Court. We reverse that judgment.

¶2 The issue on appeal is whether the District Court erred when it held that plaintiffs were not employed by a common carrier by railroad for purposes of coverage by the Federal Employers Liability Act found at 45 U.S.C. §§ 51 to 60.

STANDARD OF REVIEW

¶3 The District Court found that MRL exercised no unusual control over LRC's employees and that LRC's relationship with MRL was an arms-length relationship typical of its business with its other customers. On that basis, the court concluded that MRL did not control LRC's employees and, therefore, that they were not subservants of a company that was, in turn, a servant of the railroad, and were not entitled to claim benefits pursuant to FELA. We review a district court's findings of fact to determine whether they are clearly erroneous. *See Interstate Prod. Credit Ass'n v. DeSaye* (1991), 250 Mont. 320, 323, 820 P.2d 1285, 1287. We review a district court's conclusions of law to determine whether they are correct. *See Carbon County v. Union Reserve Coal Co.* (1995), 271 Mont. 459, 469, 898 P.2d 680, 686; *see also Kreger v. Francis* (1995), 271 Mont. 444, 447, 898 P.2d 672, 674; *Steer, Inc. v. Department of Revenue* (1990), 245 Mont. 470, 474-75, 803 P.2d 601, 603-04.

¶4 We have adopted a three-part test to determine whether a finding is clearly erroneous.

> First, the Court will review the record to see if the findings are supported by substantial evidence. Second, if the findings are supported by substantial evidence we will determine if the trial court has misapprehended the effect of the evidence. Third, if substantial evidence exists and the effect of the evidence has not been misapprehended, the Court may still find that "[A] finding is 'clearly erroneous' when, although there is evidence to support it, a review of the record leaves the court with the definite and firm conviction that a mistake has been committed."

Interstate Prod. Credit Ass'n, 250 Mont. at 323, 820 P.2d at 1287 (citations omitted).

APPLICABLE LAW

¶5 In *Kelley v. Southern Pacific Co.* (1974), 419 U.S. 318, 95 S. Ct. 472, 42 L. Ed. 2d 498, the U.S. Supreme Court established the standard for determining whether a person nominally employed by an entity that is not a railroad is, in fact, an employee of a railroad for purposes of coverage by FELA. In that case, the petitioner, Eugene C. Kelley, was technically employed by Pacific Motor Trucking Company, a wholly owned subsidiary of the Southern Pacific Company. His employment involved unloading automobiles from Southern Pacific's flat cars, and during the performance of his duties he fell from the top of one of the railroad's cars and was injured. He filed suit against the railroad in which he alleged that he was employed by the railroad within the meaning of the FELA. The federal district court agreed on the basis of the trucking company's agency relationship with the railroad. However, the circuit court of appeals reversed on the basis that an agency relationship was insufficient and that the federal district court had not found that Kelley was directly employed by Southern Pacific Company.

¶6 On appeal, the Supreme Court agreed that a simple agency relationship between the trucking company and the railroad was insufficient to bring Kelley within the coverage of the Act. It pointed out that pursuant to 45 U.S.C. § 51, coverage of the Act is extended to persons employed by a common carrier by railroad and injured by the negligence of the railroad, its officers, agents, or employees. It held, however, that an employment relationship could be established based on common law

principles without regard to Southern Pacific's denial that it was Kelley's employer. The court stated:

> Under common-law principles, there are basically three methods by which a plaintiff can establish his 'employment' with a rail carrier for FELA purposes even while he is nominally employed by another. First, the employee could be serving as the borrowed servant of the railroad at the time of his injury. See Restatement (Second) of Agency § 227; *Linstead v. Chesapeake & Ohio R. Co.*, 276 U.S. 28, 48 S.Ct. 241, 72 L.Ed. 453 (1928). Second, he could be deemed to be acting for two masters simultaneously. See Restatement § 226; *Williams v. Pennsylvania R. Co.*, 313 F.2d 203, 209 (CA2 1963). Finally, he could be a subservant of a company that was in turn a servant of the railroad. See Restatement § 5(2); *Schroeder v. Pennsylvania R. Co.*, 397 F.2d 452 (CA7 1968).

Kelley, 419 U.S. at 324, 95 S. Ct. at 476, 42 L. Ed. 2d at 506.

¶7 The Supreme Court held that since the district court had failed to make findings based on the correct test for FELA coverage , the case should be remanded to the district court for further findings consistent with the Supreme Court's decision.

¶8 In *Warrington v. Elgin, Joliet & Eastern Railway Co.* (7th Cir. 1990), 901 F.2d 88, the Seventh Circuit Court of Appeals discussed the type of proof necessary to establish an employment relationship and, therefore, entitlement to FELA benefits based on the third method recognized in the *Kelley* case. That court stated:

> In order to prevail under this method, Warrington must demonstrate that USS was acting as a servant of EJ & E [the railroad] at the time of the accident. Section 220 (1) of the Restatement (Second) of Agency defines a servant as "a person [or entity] employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control." *See also Kelley,* 419 U.S. at 326, 95 S.Ct. at 477; *Vanskike v. ACF Industries, Inc.,* 665 F.2d 188, 198-99 (8th Cir. 1981). Section 220 (2) of the Restatement lists various indicia of control, which, among others, are instructive in determining servant status. Although these factors are directed at determining whether a particular bilateral arrangement is properly characterized as a master-servant or independent contractor relationship, they are also useful in analyzing a three-party relationship between two employers and an employee. *Kelley,* 419 U.S. at 324, 95 S.Ct. at 476.
>
> *Warrington,* 901 F.2d at 90 (footnote omitted).[1]

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[1] Section 220 (2) of Restatement (Second) of Agency provides the following factors which should be considered in determining whether a master-servant relationship exists:

(2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:

(a) the extent of control which, by the agreement, the master may exercise over the details of the work;

(b) whether or not the one employee is engaged in a distinct occupation or business;

(c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

¶9 Among those factors typically considered for purposes of determining whether a master-servant relationship exists, the most significant is the degree of control that the alleged master exercises over the work of that person or entity who is alleged to be its servant. *See Tarboro v. Reading Co.* (3d Cir. 1968), 396 F.2d 941, 943; *Clifford v. United States* (D.S.D. 1970), 308 F. Supp. 957, 958; *Bond v. Cartwright Little League, Inc.* (Ariz. 1975), 536 P.2d 697, 702; *Miller v. Component Homes* (Iowa 1984), 356 N.W.2d 213, 217; *Molloy v. Massachusetts Mortg. Corp.* (Mass. App. Ct. 1998), 1998 WL 15938 1; *Kilgore Group, Inc. v. South Carolina Employment Sec. Comm'n* (S.C. 1993), 437 S.E.2d 48, 49; *Felts v. Richland County* (S.C. 1991), 400 S.E.2d 781, 782.

¶10 For example, in *Kottmeyer v. Consolidated Rail Corp.* (Ill. App. Ct. 1981), 424 N.E.2d 345, the plaintiff sued Consolidated Rail Corporation for benefits pursuant to FELA, even though at the time of his injury he was employed by Pennsylvania Truck Lines, Inc., a wholly owned subsidiary of the defendant railroad. Employees of the subsidiary corporation loaded and unloaded trailers from the defendant's flatbed cars. Following a jury trial, a

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(d) the skill required in the particular occupation;

(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

(f) the length of time for which the person is employed;

(g) the method of payment, whether by time or by the job;

(h) whether or not the work is part of the regular business of the employer;

(i) whether or not the parties believe they are creating the relationship of master and servant; and

(j) whether the principal is or is not in business.

verdict was returned finding that the plaintiff was, in fact, employed by the railroad and awarding him damages pursuant to FELA. On appeal, the railroad contended that there was insufficient evidence to establish that the plaintiff was its employee. However, the Court of Appeals for the State of Illinois noted that *Kelley* established the applicable law and that applying common law principles to the plaintiff's and the railroad's relationship, "the railroad's 'control or right to control' the performance of the services provided by the plaintiff accordingly becomes the key issue." *Kottmeyer,* 424 N.E.2d at 351.

¶11 The Illinois Court observed that:

> Cases following Kelley have recognized the importance of control in determining "employment":
>
> "'Supervision' is a criterion that in importance far exceeds the others. As used in this context, supervision means control of the individual workman's physical conduct [citation], not just oversight; 'control [of] the individual in the *performance* of his work and [of] the *manner* in which the work is done...is *usually* decisive.' [Citation omitted.] Employers are distinguished from independent contractors most basically by the detail with which the party for whom the work is eventually produced actually supervises the manner and means by which the work is performed; and *degree of control or supervision* is the principal element that differentiates employees and independent contractors at common law, in the state statutory context, and in the context of other federal statutes as well." [Footnotes omitted.] (*Lodge 1858, American Federation of Government Employees v. Webb* (D.C. Cir. 1978), 580 F.2d 496, 504-505.)

Proof of employment is not strictly limited to evidence of actual control or supervision by the railroad over the physical conduct of the plaintiff, however. Proof that the railroad had the right to control the employee's activities serves as well. (*Pelliccioni v. Schuyler Packing Co.* (1976), 140 N.J. Super. 190, 356 A.2d 4.) Such evidence both meets the Restatement definition of "servant" (Restatement (Second) of Agency § 220 (1) at 485 (1958)) and tends to establish the third method outlined by the court in Kelley by which plaintiff who is nominally employed by another can prove employment (*i.e.,* subservant of a company in turn a servant of the railroad). In determining whether the railroad had the right to control the employee's activities, all of the surrounding circumstances must be considered. (*Pelliccioni.*) In fact, the Restatement outlines a number of non-exclusive factors to be considered in determining the existence of a master-servant relationship. (Restatement (Second) of Agency § 220 (2) at 485-486 (1958).)

Kottmeyer, 424 N.E.2d at 352 (alteration in original).

¶12 In the *Kottmeyer* case, the Illinois Court held that evidence of the railroad's supervision of trucking company employees, the railroad's control of the premises where the trucking company's employees worked, and the fact that on occasion trucking company employees had worked on railroad equipment, was sufficient to establish that the plaintiff was the servant of a company which, in turn, was the servant of a railroad.

¶13 With these rules in mind, we will review the evidence presented to the District Court.

FACTUAL BACKGROUND

¶14 Railroad repair shops were built in Livingston by the Northern Pacific Railroad in 1883 to maintain the locomotives and cars used on its trains. The Burlington Northern Railroad took over operation of those shops in 1970 and performed both running repair and major repair at that location. Running repair included scheduled maintenance, inspections, and minor service, such as grease, oil, and filter changes which do not require taking a locomotive out of service. It is performed in a facility known as a roundhouse. Major repair is done in that part of a repair facility known as the back shop. It includes rebuilding damaged locomotives and cars and overhauling motors or other mechanical parts of a locomotive, and requires that the locomotive or car being worked on be taken out of service.

¶15 The BN closed its roundhouse at the end of 1982 and its back shop in 1985.

¶16 In late 1986 or early 1987, the Washington Corporation, whose principal shareholder is Dennis Washington, was approached by an investment banker about purchasing BN's southern line, which included its trackage and facilities from Laurel, Montana, to Sand Point, Idaho. Washington arrived at a general agreement regarding price for BN's southern line in the summer of 1987, and he and several other investors formed Montana Rail Link, Inc. (MRL), in the fall of 1987 for the purpose of purchasing, owning, and operating a railroad over that line for the transportation of freight and goods. After its formation, MRL acquired lease rights to BN's southern line, purchased some branch lines, operating equipment,

including locomotives, cars, and maintenance equipment, and agreed that other industrial properties could be included in the transaction by negotiation at a future date.

¶17 Other than that part of BN's Livingston repair shops which was included in the right-of-way for its southern line, the major repair facilities were not included in the original discussions between BN and the principals who ultimately formed MRL. However, at some point in the negotiations, the MRL principals had noticed that a significant piece of property in Livingston had not been included and it was suggested that it be conveyed as part of the transaction. That change was made after consideration for the transaction had been agreed upon at no additional cost to MRL.

¶18 MRL's original business plan made no provision for a running repair facility, nor for any participation in major repairs or rebuilding locomotives. It anticipated minimal running repairs by MRL's work force at locations other than Livingston, and all heavy repairs done by other providers. One anticipated source of major repair work was BN's facility in Glendive.

¶19 MRL began operations in October 1987 and sent locomotives to BN for repairs that could not be made by MRL in Missoula or Laurel. They found this arrangement unsatisfactory, however, because it took too long to get locomotives to BN and back, and it was costing more money than MRL concluded it would cost to do minor repairs on its own locomotives. The time that their locomotives were out of service became significant because MRL had more business volume than had been anticipated in its business plan. By October 1988, MRL was doing its own running repair at the Livingston facility.

¶20 The principals in MRL also recognized that it was cheaper to have major repairs and locomotive rebuilding done by what they referred to as "contract employees," rather than railroad employees. Contract employees were simply those who worked for some company other than a railroad. Therefore, shortly after MRL decided to do its own running repair at the repair facilities in Livingston formerly operated by BN, the principals in MRL also formed another company known as Livingston Rebuild Center, Inc. (LRC), for the purpose of operating the back shop at the Livingston repair facilities where major or heavy repair work could be done and where rebuilding locomotives could also be accomplished. LRC was incorporated in January 1988, and began operations in June of that year, doing work identical to that which had been done by BN at the same location.

¶21 The land which LRC occupied at the time of trial was originally owned by MRL and included that land added to the transaction late in MRL's negotiations with BN. It originally consisted of fifty-six acres and was transferred to LRC by MRL on January 4, 1988. Although the facilities on that property were insured by LRC in November 1988 for $8,000,000, and the land and improvements were appraised during 1988 for tax purposes at nearly $3,200,000, MRL received no consideration for the property when it was transferred to LRC.

¶22 It was disputed at the time of trial whether a major repair facility, like the one for which LRC was created, was necessary to MRL's operation of its railroad. It was generally agreed that if major repair work was not done in Livingston, the next closest major repair facility was in Boise, Idaho, and that prior to the creation of LRC, MRL's major repair work was being done as far away as Illinois.

A number of LRC employees testified that MRL would not have been able to continue operating the railroad without a back shop for the repair of locomotives because the fleet of locomotives that it inherited from BN was, on the average, twenty to twenty-five years old, and that many of those locomotives were in need of major repair. In fact, in July 1988, MRL's chief mechanical officer indicated that in order to meet industry standards and produce a fleet with an average age comparable to other railroads, MRL would have to rebuild two locomotives a month for 1989, and one per moth each of the following four years, at a cost of between $300,000 and $600,000 per locomotive. Even MRL's principals agreed that a railroad cannot operate without major repair of its cars and locomotives and that it has generally been less expensive to have that work done in Livingston than at a distant location. MRL apparently has never purchased a new locomotive.

¶23 In spite of these facts, railroad officials testified at trial that while major repair work was necessary, it was not necessary that it be done in Livingston. What all parties did agree on was that it was cheaper to have major repair work done by an independent contractor like LRC than by railroad employees. Because of the difference in union and non-union wages, and because of the cost of railroad retirement benefits, Bill Brodsky, the president of MRL, estimated a thirty-seven percent reduction in labor expense by having LRC do rebuild work, rather than BN, and a twenty-two percent savings compared to having that work done by MRL employees. According to Dorn Parkinson, the chairman of MRL's board of directors, an estimated nineteen percent savings could be realized for the cost of labor by avoiding just the cost of railroad retirement benefits.

¶24 It was undoubtedly because of these cost factors that the principals in MRL formed LRC. From the time LRC was formed in 1988 until this case was tried in May 1993, the two companies had common ownership and control. Of the thirty-two shareholders who invested in MRL, thirty-one invested in LRC and constituted all of LRC's owners. The Dennis Washington Trust owned 79% of the stock in MRL, and 78.49% of the stock in LRC.

¶25 Dennis Washington was originally the chairman of the board of directors for both MRL and LRC, but was replaced by Parkinson, the president of Washington Corporation in 1986. Parkinson continued to serve as chairman of the board of both corporations at the time of trial. Brodsky, the president and a director of MRL, is also a shareholder in LRC, and all of LRC's directors at the time of trial were employees of the Washington Corporation.

¶26 Based on this common ownership and control, it is not surprising that LRC's original business plan anticipated receiving one-hundred percent MRL's major repair work, and that it did; that even at the time of trial, seventy percent of LRC's work was done for MRL; and that when from time to time MRL suggested, based on its needs, that LRC add service, that was done.

¶27 Since the shareholders of any corporation choose its directors, and since Dennis Washington is the principal shareholder of both corporations, he effectively exercised control over both companies by choosing each company's directors.

¶28 It is perhaps because of this ownership and control that LRC was investigated by the Railroad Retirement Board, which decided in 1989 that LRC was an employer

within the meaning of the Railroad Retirement Act and, therefore, liable for payment of railroad retirement and railroad unemployment insurance contributions for its employees.

¶29 Although "employer" is statutorily defined for purposes of railroad retirement coverage, and although that definition is not identical to the common law test that we apply in this case, it does include the common consideration of "control."

¶30 The definition of an employer contained in § 1 (a) of the Railroad Retirement Act (45 U.S.C. § 231 (a)(1) (1976)[2]) reads, in part, as follows:

> The term "employer" shall include—
>
> (i) any express company, sleeping car company, and carrier by railroad, subject to part I of the Interstate Commerce Act;
>
> (ii) any company which is directly or indirectly owned or controlled by, or under common control with, one or more employers as defined in paragraph (i) of this subdivision, and which...performs any service...in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad....

(Emphasis added.)

¶31 Based on this statutory definition and the common ownership and control previously discussed, the Deputy

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[2] The 1976 version of the Railroad Retirement Act was relied upon and quoted by the Railroad Retirement Board.

General Counsel for the Railroad Retirement Board held that:

> The mutual use of directors by MRL and LRC and the fact that the same individual is president, chairman of the board and principal shareholder of both MRL and LRC indicates that LRC clearly falls within these provisions. Therefore, I find that LRC is under common control with one or more railroad employers. (See 20 C.F.R. 202.4 and 202.5; see also legal opinion L-89-19).
>
> ....
>
> Based upon the above discussion, it is my opinion that Livingston Rebuild Center, Inc., is an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts by reason of its being under common control with a railroad employer and performing service in connection with the transportation of passengers and property by rail.

United States Gov't Memorandum R.R. Retirement Bd., L-89-85 (July 7, 1989).

¶32 LRC did not appeal the Railroad Retirement Board's determination that it was under common control with a railroad employer. It did appeal the determination that it performed service in connection with the transportation of passengers and property by rail. However, that finding and conclusion was affirmed by the Seventh Circuit Court of Appeals in *Livingston Rebuild Center, Inc. v. Railroad Retirement Board* (7th Cir. 1992), 970 F.2d 295.

¶33 While we do not conclude that the decision of the Railroad Retirement Board or the Seventh Circuit Court of Appeals is dispositive of the issue in this case, we do think the Board's finding that LRC was under control of the

principals in MRL is probative of the issue in this case. In addition, there was other undisputed evidence of the practical ways in which MRL's control over LRC was manifested.

Land Exchanges

¶34 One indication of MRL's effective control over LRC was the manner in which property was transferred from and to MRL without consideration or with less consideration than full market value, based on MRL's perception of its own self-interest.

¶35 For example, the land which LRC now occupies was, as noted, transferred from MRL to LRC without consideration, following LRC's creation in 1988. The land consisted of fifty-six acres and included not only the facilities out of which LRC currently operates the back shop, but also a trailer park and lumber yard at another location on the property. Even after the original transfer, MRL continued to occupy a portion of the property where it operated its running repair shop, but paid LRC no compensation for the use of that land. There was an advantage to MRL in not owning the land because it was potentially a superfund clean-up site, and even though BN was ultimately responsible for the cost of clean-up, substantial out-of-pocket expenses could have been incurred prior to reimbursement from BN. LRC transferred 4.66 acres back to MRL in January 1989. This land included the running repair shop where MRL continues to operate. However, once again, no consideration exchanged hands.

¶36 Even after trailer park was transferred to LRC, MRL continued to receive all of the rental proceeds from the

operation of the trailer park. Then in July 1990, LRC also transferred the trailer park and the lumber yard back to MRL without consideration.

¶37 As part of the original transaction, MRL transferred to LRC a wastewater treatment plant. In 1992, when the principals in MRL became concerned about LRC's solvency, and knowing that the wastewater treatment plant was indispensable to MRL's operation, the principals in LRC, who were the same people, agreed to transfer the wastewater treatment plant to MRL for approximately $145,000. This is in spite of the fact that Dale McLeary, who at that time was the comptroller of LRC, advised Parkinson, who was then chairman of the board for both LRC and MRL, that the taxable value of the plant was $658,000, the original cost was $1,400,000, and the replacement cost of the wastewater treatment plant, which was also essential to LRC's operation, would be $2,139,000. Instead of owning the wastewater treatment plant, LRC ended up with an adjustable rental agreement for water usage which could be canceled on thirty-days' notice by MRL.

¶38 None of these facts regarding the transfer of property back and forth between MRL and LRC are disputed. MRL's principals did testify that there was no reason to charge LRC for property which MRL, in effect, paid no consideration to BN. They also argued that there was no reason to pay consideration to LRC when MRL recovered property that had been transferred to LRC by mistake. However, they offer no explanation for why one independent corporation dealing with another corporation in an arms-length transaction would convey property worth potentially millions of dollars at the second corporation's request simply because of a contention that it had originally been transferred to the first corporation by mistake.

¶39 The fact that these transfers were made without consideration or with inadequate consideration when MRL deemed a transfer in its best interest is undisputed and is strong evidence of MRL's control over LRC.

Physical Premises

¶40 LRC's major repair and rebuild facility, and MRL's running repair facility are all operated under one roof. When LRC's first employees arrived, they used MRL's facilities, including its running water, bathroom facilities, and lunch room because they had no facilities of their own. LRC employees frequently went to the MRL end of the building to discuss matters with other employees, borrow tools, or get necessary parts. In reality, the physical plant was originally operated just as it had been by BN when it performed both running repair and major operations at that facility. However, at some point during the Railroad Retirement Board's inquiry into the issue of LRC's common control by owners of a railroad, a twelve-foot-high plywood wall was constructed separating LRC's operations from MRL's operations. The wall was constructed about six or seven months after LRC started business. However, LRC employees described the wall as more of an inconvenience than anything and testified that employees of each company were still frequently observed on the other company's side of the wall when it was necessary for their work. Paul Nardella, who worked for LRC, was told by Bill O'Neil, one of the company's vice presidents, that the wall was built for the purpose of creating separate companies in the event that Railroad Retirement Board people showed up to inspect the property. Furthermore, LRC continued to locate its offices on the second floor of what would be the MRL side of the wall.

¶41 MRL officials testified that the twelve-foot wall in a building with thirty-five foot ceilings was erected for the protection of its equipment and parts. However, no one disputed that each company's employees still had access to the other company's premises and that the free exchange of tools, equipment, and parts continued.

Training and Supervision

¶42 Paul Nardella, who was hired by LRC on June 10, 1988, and who worked as an electrician in the locomotive shop, a radio man, and a road test man, testified that when he was trained as a radio man he was trained by MRL's personnel from Laurel.

¶43 Jesse Ross, who worked in LRC's paint shop from July 1988 until January 1989, testified that when he arrived as an employee, his supervisors were basically organized and trained by shop foremen from MRL. Although John Weish, MRL's general foreman of its mechanical division, testified that he did not personally train people in LRC's paint shop, no one in a supervisory capacity for LRC otherwise contradicted the testimony of either Nardella or Ross about training.

¶44 Craig White testified that he worked for LRC in both the locomotive shop and the car shop from February 1989 until July 1991, and for a three-month period during the latter part of 1992. During that time, he observed Weish and Dan Smith, another MRL foreman, on LRC's side of the building several times a week, inspecting units owned by MRL and giving directions on how things were to be done. He stated that the inspection done by MRL officials involved more verbal interaction than the final inspections

performed by other customers who were usually more concerned about the final product and did not get involved on a daily basis during the course of LRC's work. He stated that Smith, in particular, was on LRC premises continuously while work was being done, overseeing how things were going, making changes and suggestions, and advising LRC workers of what he wanted done.

¶45 Danna Parrow, who first went to work for LRC in 1989 and worked there until 1991, first in the locomotive shop and then in the area where air brake systems are repaired, and who had previously worked for BN when they ran the same facility, testified that Weish's involvement in her work was so pervasive that she actually thought he had authority to fire her.

¶46 Nardella testified that during the time he worked for LRC he saw Smith on the LRC side nearly every day in the back shop, and Weish on the LRC side of the building an average of three times per week. He testified that on occasion he saw MRL supervisors instructing LRC workers how to do their work, and that MRL supervisors did more than monitor quality control, which was the function of inspectors for other railroads. He felt that his daily work was supervised by MRL. He testified that the extent and nature of inspections and hands-on involvement by MRL supervisors was totally different than that done by inspectors for any other railroad, and that MRL supervisors actually physically worked on locomotives with LRC employees.

¶47 Robert Watts, who went to work for LRC in June 1988 and worked there for two years, first in the paint shop, then as a crane operator, and then as a hostler moving locomotives from one spot to another, testified that Smith not only occasionally gave him advice on his work, but he

actually saw Smith do work on a locomotive in their back shop. He testified that as opposed to inspectors from other railroads who just inspected the finished product, Weish was there every day when he worked in the paint shop. He stated that Smith even gave him occasional instructions while he was working on locomotives other than those owned by MRL.

¶48 John Bauer, who was a locomotive engineer employed by LRC since 1989, and who worked in both the back shop area and in locomotive repair, testified that his work had been supervised by Smith, who did work of his own on the same locomotives that LRC employees were working on. He had also seen Smith directing the work of other LRC employees. He stated that over the years he had been directed on how to do his work by Smith on a couple dozen occasions.

¶49 Dennis Thorson, who worked for LRC as a welder-fabricator in the locomotive shop and later in the car shop, testified that he had been directly supervised by Smith on a frequent basis and that he was occasionally ordered to go down to MRL's side of the building and do welding when that shop was busy and there was urgent work to be done. He stated that as opposed to the inspectors from other companies, Smith acted more like a direct supervisor than a quality control inspector.

¶50 Chuck Winnett, the president of LRC since 1991, acknowledged that on occasion Dan Smith had told LRC employees what to do, but did not agree that the same was true for Weish.

¶51 Parrow, Watts, and Danial Newman, an employee in LRC's car shop, all testified that if there was a choice

between doing work for two different companies, it was clear to them that they were to give MRL's work priority.

¶52 On one occasion, Parrow was interviewed by the producers of a video who asked her, in the presence of Dennis Washington, how she liked working for Mr. Washington's railroad.

¶53 In response to overwhelming evidence of MRL's control of LRC's daily work, MRL offered the testimony of Melvin Dinius, its chief mechanical officer, and Weish. Dinius testified that Weish's responsibility was simply to assure quality control of the work done by LRC just as he did at other facilities around the country. He stated that Weish was not authorized to deal directly with LRC crews, and should have dealt with LRC supervisory personnel if he had concerns.

¶54 Weish also testified that on those occasions when he had been at LRC to inspect, it had merely been for the purpose of quality control, and that more often than not, an LRC supervisor had been present at the same time. However, he admitted that during the course of his inspections of MRL equipment, it would not be uncommon for him to comment to the people who were working on it if he noticed something that needed their attention.

¶55 Smith was not called by MRL to explain either his frequent presence on LRC's facilities or his active involvement in the supervision of LRC's employees. Nor did anyone else on behalf of MRL controvert the testimony given by LRC's employees regarding Smith's extensive involvement in and supervision of their work.

Parts, Tools, and Equipment

¶56 Jeff Ross testified that when he went to work for LRC, LRC did not have all of the tools that it needed and it constantly had to borrow tools from MRL. A number of employees testified that even after LRC was established in business, it was not uncommon for the two companies to share tools and equipment, including overhead cranes and forklifts, but that for a period of time, LRC employees borrowed tools from MRL on a daily basis. McLeary acknowledged that there were no records which reflected any payment from LRC to MRL or vice versa for the use of tools or equipment. Dinius, the chief mechanical officer for MRL since October 1987, testified that he was aware that LRC employees borrowed equipment and tools from MRL and that it was done with his approval.

¶57 LRC employees also testified to community boxes or baskets of parts that were shared between the two companies. Sometimes records were kept and sometimes they were not. However, during the early period of LRC's operation, records were not kept.

¶58 Dinius testified on behalf of MRL that it was not uncommon to borrow and loan equipment with other companies. However, no one testified that MRL exchanged equipment with anyone as frequently and regularly as it did with LRC.

Storage of Equipment

¶59 It was undisputed that MRL stored engines, generators, and other large pieces of equipment on LRC's premises, including its electrical shop, for long periods of time. McLeary admitted that LRC did not receive rental

checks from MRL for this use of its buildings, even though other businesses which stored materials on LRC property did pay rent. William Brodsky, the president of MRL, acknowledge that he was aware that MRL parked cars and locomotives on LRC property without compensation to LRC. Chuck Winnett, the president of LRC, acknowledged that some of those cars and locomotives remained on LRC property for months or years. Dinius could not offer as examples any other railroads who freely stored their equipment on LRC property.

¶60 MRL's use of LRC's property in this manner was uncontradicted.

Control of Business Practices

¶61 the Washington Corporation, which was principally owned by Dennis Washington, had a procedural manual for companies like LRC which were also principally owned by Dennis Washington and which were referred to as Washington companies. It required that LRC's cash be managed by the Washington Corporation; that all non-budget purchases be approved by Parkinson, president of the Washington Corporation; that LRC could not open or close a bank account without approval by Helen Miller, an employee of the Washington Corporation; and that LRC contribute a designated percentage of its annual profits to a charitable foundation funded by other Washington companies and Dennis Washington. The manual even provides that wage increases have to be approved by the Washington Corporation president. The principal owner and the president of the Washington Corporation are also the principal owner and chairman of the board for MRL. In other words, the owner of MRL and its board chairman controlled virtually every significant detail of LRC's financial operation. It was, perhaps, with these details in

mind that the District Court observed that "there seems to be something Machiavellian about this case."

¶62 Although Parkinson denied that all of these policies were enforced, he did not deny that they were in effect and could have been enforced.

DISCUSSION

¶63 We conclude, based upon those facts which are undisputed in this case, that MRL did control the operation of LRC, and that the District Court's Finding No. 24 that MRL and LRC had an arms-length relationship, and its Finding No. 27 that LRC functioned independently, are clearly erroneous. We also conclude that the District Court erred when it held that there was no evidence that MRL controlled the work of LRC. We conclude that a master-servant relationship between MRL and LRC is established by not only the common control of MRL and LRC through its ownership and directorship, but also MRL's direct, frequent, and unique supervision of LRC's employees; MRL's at-will acquisition of LRC's property when acquisition was in MRL's self-interest; LRC's dependence on MRL for training, tools, equipment and parts; and MRL's use of LRC's property for its own purposes without compensation to LRC.

¶64 The relationship between MRL and LRC is not typical of two independent corporations acting in arms-length fashion. It is typical of one corporation being dependent on and controlled by another for the other's benefit. This relationship satisfies the requirement for finding that the plaintiffs were subservants of a company that was, in turn, a servant of the railroad and, therefore, are entitled to coverage by the Federal Employers Liability Act as employees of MRL during the times in question.

¶65 The effect of this opinion, however, is limited to that time from LRC's creation until May 17, 1993, when majority ownership was transferred to Randy Peterson. LRC's status following that date is not before us and nothing said herein pertains to the present corporation.

¶66 In summary, we conclude that the plaintiffs in this case were, at the times they complain they were injured, employees of Montana Rail Link, Inc., and therefore, covered by the Federal Employers Liability Act.

/s/ Terry Trieweiler
Justice

We Concur:

_____
Chief Justice

/s/ William E. Hunt, Sr.
/s/ James C. Nelson
/s/ W. William Leaphart
/s/ Jim Regnier

_____
Justices

Justice Karla M. Gray, dissenting.

¶67 I respectfully dissent from the Court's opinion. I would hold that the District Court's findings of fact are not clearly erroneous and its conclusions of law are correct and, on that basis, I would affirm that court's decision in its entirety.

¶68 I do not disagree with the "APPLICABLE LAW" portion of the Court's opinion. I agree that *Kelley's* third method of establishing an employment relationship is at issue in this FELA case and that, under that test, the plaintiffs must establish that the LRC is a servant of MRL such that the plaintiffs, in turn, are subservants. Moreover, the criteria set forth in the Restatement (Second) of Agency § 220 (2), are applicable in making that determination and those criteria are, as expressly stated therein, "matters of fact." In addition, as *Kottmeyer* instructs, the question of whether the plaintiffs were "employed" by a common carrier by railroad under *Kelley's* third method of establishing such employment also is a question of fact for the finder of fact, based on all relevant evidence. *See Kottmeyer,* 424 N.E.2d at 352-53. Importantly, the *Kottmeyer* court was reviewing the jury's special interrogatory verdict finding the plaintiff *had been employed* by the railroad at the time of his injury to determine whether sufficient evidence supported the jury's finding. *See Kottmeyer,* 424 N.E.2d at 347. Our proper role here is the same: to determine whether the findings *in favor of MRL and the LRC* regarding control and employment made by the District Court—acting as the factfinder in this case—are supported by the evidence.

¶69 My biggest problem with the Court's opinion is that, having correctly stated the applicable law, the Court

thereafter fails to apply it. In other words, having set forth the applicable legal principles, including the criteria contained in § 220(2) of the Restatement (Second) of Agency, the Court's opinion never again mentions—much less applies—the law.

¶70 The Court's actual approach to this case is foreshadowed by its early statement that "we will review the evidence presented to the District Court." (Emphasis added.) The proper approach to reviewing a trial court's findings of fact to determine whether they are clearly erroneous is for this Court to examine the record to ascertain, first, whether substantial evidence supports that court's findings. Here, the Court does not do so; instead, it sets forth at some length the portions of the record upon which it ultimately will make its own determinations about the weight of the evidence. Indeed, the reader would never know from reading the Court's opinion that, after a 9-day bench trial at which nearly two dozen witnesses testified and for which the transcript exceeds 2000 pages, the District Court entered 53 pages of extensive findings of fact and conclusions of law. The reader also would not know that the specific findings by the District Court which this Court determines are clearly erroneous—namely, Finding No. 24, that MRL and the LRC had an arms-length relationship, and Finding No. 27, that the LRC functioned independently—were premised on extensive earlier findings which resulted from that court's weighing of the evidence and credibility determinations and in which the District Court stated the evidence on which it relied.

¶71 Moreover, the so-called "FACTUAL BACKGROUND" presented in the Court's opinion is—in large part—nothing of the kind. Examples of non –"facts" included in that portion of the opinion are entirely speculative phrases by the Court—not by any witnesses in

this case—such as "[i]t was undoubtedly because" and "[i]t is perhaps because." In addition, the Court editorializes in its "facts" by such phrases as "it is not surprising."

¶72 In addition, the Court's purported "FACTUAL BACKGROUND" is salted with statements of law which have no relevance or application to this case, such as the definition of "employer" contained in the Railroad Retirement Act. While the Court concedes that the definition is "not identical" to that at issue in this case, the Court attempts to buttress its opinion by the suggestion that the "common consideration of 'control'" contained in the nonapplicable definition is somehow relevant here. A comparison of the definition of control contained in the Railroad Retirement Act with the criteria contained in § 220 (2) of the Restatement (Second) of Agency reflects that the "control" elements are, indeed, significantly different. Thus, the Court's inclusion of the opinion rendered by the Deputy General Counsel for the Railroad Retirement Board—in a different proceeding under a different definitional standard—that the LRC "is under common control with one or more railroad employers" has no bearing here, either legally or factually. Nor is it relevant to this case that the LRC did not appeal that determination or that the Seventh Circuit Court of Appeals affirmed a separate determination appealed by the LRC. Likewise, the Court's ¶ 33, in the so-called "FACTUAL BACKGROUND" section of the opinion, is a statement of the Court's legal opinion that the Railroad Retirement Board's finding that the LRC was under the control of the principals in MRL is "probative of the issue in this case." The statement is not only not "factual", it is incorrect, given the Court's earlier correct statement that *Kelley* and the Restatement are the applicable law in this case.

¶73 What follows in the Court's opinion is a several-page summary of the evidence *it* has culled from the 2146-page transcript of the trial in this case. That summary presents only the evidence the Court wishes to recognize, since it is evidence that supports the Court's result. The problem is that the Court excludes massive amounts of other evidence, much of which the District Court relied on in making its 18-page findings of fact, and which support the District Court's findings.

¶74 I cannot agree. I would affirm the District Court's findings and conclusions and I dissent from the Court's failure to do so.

/s/ Karla M. Gray
Justice

Chief Justice J.A. Turnage joins in the foregoing dissent of Justice Karla M. Gray.

/s/ J.A. Turnage
Chief Justice

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 94-039

ROBERT R. WATTS, et al.,
Plaintiffs and Appellants,

v. **ORDER**

MONTANA RAIL LINK, INC., et al.
Defendants and Respondents.

Filed April 22, 1999
Ed Smith, CLERK OF THE SUPREME COURT,
STATE OF MONTANA

Respondent Montana Rail Link's petition for rehearing filed with this Court on March 9, 1999, is DENIED.

The Clerk of Court is directed to mail a true and correct copy of this order to all parties of record.

DATED this 22nd day of April, 1999.

/s/ Terry Trieweiler
/s/ Jim Regnier
/s/ James C. Nelson
/s/ William E. Hunt, Sr.
/s/ W. William Leaphart
Justices

Chief Justice J. A. Turnage and Justice Karla M. Gray would Grant the petition for rehearing.

Filed this 30th day of Sept. A.D., 1993
at 11:15 o'clock AM
June Little
Clerk of District Court
Park County, Montana
By Tracy Putnam, Deputy

MONTANA SIXTH JUDICIAL DISTRICT COURT,
PARK COUNTY

PAUL F. NARDELLA,
Plaintiff, Cause No. 91-151

v.

MONTANA RAIL LINK, INC., a
Montana Corporation, and
LIVINGSTON REBUILD CENTER, INC.
a Montana Corporation,
Defendants.

DENNIS A. THORSON,
Plaintiff, Cause No. 91-152

v.

MONTANA RAIL LINK, INC., a
Montana Corporation, and
LIVINGSTON REBULD CENTER, INC.,
a Montana Corporation,
Defendants.

DANIAL K. NEWMAN,
Plaintiff, Cause No. 91-150

v.

MONTANA RAIL LINK, INC., a
Montana Corporation, and
LIVINGSTON REBULD CENTER, INC.,
a Montana Corporation,
Defendants.

ROBERT R. WATTS,
Plaintiff, Cause No. 91-149

v.

MONTANA RAIL LINK, INC., a
Montana Corporation, and
LIVINGSTON REBULD CENTER, INC.,
a Montana Corporation,
Defendants.

ROBERT F. BURNS,
Plaintiff, Cause No. 91-143

v.

MONTANA RAIL LINK, INC., a
Montana Corporation, and
LIVINGSTON REBULD CENTER, INC.,
a Montana Corporation,
Defendants.

DANNA PARROW,
Plaintiff,

Cause No. 91-172

v.

MONTANA RAIL LINK, INC., a Montana Corporation, and LIVINGSTON REBULD CENTER, INC., a Montana Corporation,
Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause was tried by the Court sitting without a jury beginning on April 26, 1993 and continuing through May 6, 1993. Plaintiffs Danial Newman, Dennis Thorson, Danna Parrow, Robert Watts and Paul Nardella were present at the time of trial and were represented by Monte Beck and John Richardson of Beck Law Offices. Plaintiff Robert Burns was present and represented by J. Bruce Scrafford. At the close of the Plaintiffs' case, however, Plaintiff Robert Burns dismissed his claims against Defendants Montana Rail Link, Inc. and Livingston Rebuild Center with prejudice. Defendant Montana Rail Link, Inc. was represented by Ronald B. MacDonald and Darla J. Keck of Datsopoulos, MacDonald and Lind, P.C. Defendant Livingston Rebuild Center, Inc. was represented by Jon Dyre of Crowley, Haughey, Hanson, Toole & Dietrich, Ronald B. MacDonald and Darla J. Keck of Datsopoulos, MacDonald & Lind, P.C.

Having heard the evidence and testimony presented at the time of trial, this Court hereby makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. During the winter of 1987, Dennis R. Washington began negotiating with Burlington Northern Railroad (BN) to purchase its short line between Laurel, Montana and Sandpoint, Idaho. Although Dennis Washington personally participated in the initial negotiations with BN, Dorn Parkinson was responsible for the acquisition of the railroad on behalf of Mr. Washington and the other incorporators. By the summer of 1987, an agreement was reached for the purchase of real property, equipment, facilities, and a lease of the main line for approximately $170,000,000. While the Missoula and Laurel yard facilities were included in this sale package, the Livingston backshop facilities were not included. The backshop had historically been used by BN for major repairs and rebuilds, but had been closed by BN for several years prior to the negotiations with the incorporators of MRL.

2. At the time the initial business plan of MRL was being developed, MRL was not anticipating needing a running repair facility in Livingston since BN had agreed to handle MRL's running repairs in Glendive, Montana. Moreover, since the BN sale had guaranteed that MRL would receive a working class of locomotives with the sale, MRL was not anticipating needing major repairs of its BN locomotive fleet.

3. After the terms and price of the agreement with BN had been reached, Dorn Parkinson became aware of the existence of the Livingston backshop facilities. He discovered that BN had been trying to rid itself of this property for some time to escape the significant property tax and insurance liabilities associated with the ownership of a

nonused building. The existence of significant contingent environmental liabilities had made it difficult to market the property.

4. Accordingly, negotiations by Dorn Parkinson were expanded with BN in an effort to obtain the additional property. These negotiations resulted in the inclusion of the Livingston shops in the final transaction. The purchase price did not change as a result of the inclusion of this additional property. As a matter of convenience, the backshop was included in the closing of the sale from BN to MRL.

5. The backshop was never intended to be owned or used by MRL. MRL's focus was to be a railroad and not to operate a contract repair facility. MRL's small fleet of 54 locomotives could not sustain a backshop. BN had a fleet of some 2,000 locomotives at the time it closed the Livingston Shops for economic reasons. Any attempt by MRL to offer backshop services to other railroads would have been significantly hampered, if not precluded, by union prohibitions. MRL did not need a backshop to sustain its railroad operations since there were numerous backshops across the country that could perform any needed backshop work.

6. The Livingston Rebuild facility was always intended to run as a separate corporation. Dorn Parkinson and Dennis Washington discussed this possible business venture with the other MRL shareholders to determine their interest in pursuing this opportunity. It was agreed that those who wished to participate in this venture could do so, if they were willing and able to extend the necessary capital to fund its operations. All but one of MRL's shareholders, Mike Levin, elected to participate in this separate business opportunity.

7. On January 4, 1988, only sixty days after the closing of the BN/MRL transaction, LRC was incorporated under the laws of the State of Montana. Immediately following its incorporation, MRL deeded to LRC the property which had been intended by LRC's incorporators to belong to LRC. This property became part of the shareholders' initial capitalization of LRC together with their personal funds. Long term financing for LRC was obtained through the Montana Board of Investment based on the financial strength of LRC and the personal guarantee of LRC shareholder Dennis Washington.

8. In February of 1988, MRL realized that its repairs by BN at its Glendive facility were taking too long causing significant down time. MRL then decided to open the running repair shop in Livingston. This repair facility was up and running by March of 1988. The majority of this facility was within the right-of-way MRL obtained from BN, and had therefore never been transferred to LRC. In addition, the shareholders of MRL and the incorporators of LRC had agreed from the outset that MRL would retain those portions of the facility necessary to run the railroad. Pursuant to their prior agreement, the small running repair drop pit was surveyed to be a part of the MRL properties.

9. A survey was conducted in October of 1988 in order to relocate common property boundaries. The final certificate of survey was filed in January of 1989 with the Park County Clerk and Recorder. Following this survey, a new wall was erected to continue the physical division between MRL and LRC. Although Plaintiff Nardella testified that he had understood the wall to have been built in order to "show the railroad retirement board" that MRL and LRC were two separate companies, the evidence demonstrated that throughout the history of MRL and LRC a

wall had always separated the companies, long before railroad retirement and FELA had even become an issue. The physical separation also served to maintain security for both LRC and MRL for their inventories and equipment and separated union versus non-union shops.

10. The uncontested testimony establishes that at the time of its incorporation, the shareholders of LRC and MRL had no discussions about nor any intent to avoid either FELA or railroad retirement liability in their incorporation of LRC. Since no other remanufacturing companies in the United States were subject to such liability, there was no reason for the incorporates of LRC to have such an intent. To LRC's surprise, the Railroad Retirement Board notified LRC in the late summer of 1988 that the Board believed LRC to be under the Railroad Retirement Act as a result of the common ownership of LRC and MRL. Since railroad retirement benefits are a significant labor additive and were not being paid by its competitors, LRC fought the Railroad Retirement Board's ("RRB") determination through the Seventh Circuit Court of Appeals. LRC was unsuccessful in its appeal of the RRB's determination.

11. In June of 1988, LRC began its operations as a remanufacturing business. LRC, as a remanufacturing company, hired numerous employees, both with and without previous railroad experience. At the time of trial, only 44 out of the LRC 170 employees had any prior railroad experience.

12. MRL is not "dependent" upon LRC to operate its railroad, both the Chief Mechanical Officer of Montana Rail Link, Inc., Mel Dinius, and the President of Montana Rail Link, William Brodsky, testified that the services offered by LRC were widely available from many other remanufacturing companies. Any additional transportation costs would be minuscule compared to MRL's gross

revenues. In fact, even the amounts spent in its remanufacturing of locomotives is very small. The percentage of MRL revenues devoted to remanufacturing of BN locomotive was zero in 1987 and 1988, 1.1663% in 1989, 1.51% in 1990, .3569% in 1991 and zero in 1992.

13. The Plaintiffs allege that LRC does "the same type of work" in the backshop that BN performed, and therefore they are "railroad workers." However, the same witnesses testified that if they worked for Morrison-Knudson, again because they would be "doing the same work", that they would also consider themselves to be "railroad workers". Morrison-Knudson is a remanufacturing company; it is not a railroad, nor is it affiliated with any railroad.

14. Since MRL and LRC's shops were originally developed for use by BN the utilities for the buildings were not separately metered. LRC investigated the cost of separating the utilities and determined that it would not be cost effective. Accordingly, LRC paid for the utilities, then billed MRL for its proportionate share. When MRL's share could not be exactly quantified the common expenses were billed on square footage. The only expense billed on a fifty/fifty basis was the wastewater treatment plant expense, since there was no real way to identify its usage. This difficulty was eventually a part of the reason LRC to decide to sell the wastewater treatment plant to MRL.

15. Insurance was maintained on the property by LRC with MRL named as an additional insured. This procedure was suggested by LRC's insurance agent, John Moran of Terry Payne & Company. By insuring all of the property through LRC, LRC avoided possible subrogation disputes with MRL's insurance carrier. This procedure is often utilized when different parties or entities utilize a common building. In order for LRC to fully bill MRL for its share of

the insurance coverage, John Moran provided LRC with a precise breakdown of MRL's portion of the insurance cost. This amount was then billed to and paid by MRL.

16. In June of 1990 it was discovered by LRC's accounting department that MRL's initial deed in January of 1988 had inadvertently included a legal description which covered a portion of MRL's land which was being leased to a lumber yard and trailer court. Despite the error in the deed, MRL had continued to exert dominion and control over the property and had been accepting the rents from the lease of the land. When the error was discovered a correction deed was filed on July 10, 1990. The property taxes inadvertently paid by LRC were reimbursed by MRL through an offset on another building.

17. Both MRL and LRC maintain their own equipment, parts, tools and inventory. However, due to the highly specialized nature of these types of tools and equipment, from time to time specialty tools and equipment were borrowed between MRL and LRC. In order to borrow such the employees would have to request permission from their supervisor who would, in turn, ask permission from the MRL supervisor. Without exception, each of the tools and equipment which was borrowed was always immediately returned. This type of borrowing and lending without compensation is common in the industry. For example, Mel Dinius testified that when he worked for the Illinois Central, borrowing tools between unrelated companies was a constant occurrence due to the small size of the short line railroads. Mr. Dinius also testified that he has loaned MRL's specialty tools and equipment without charge to numerous businesses including, Otto's Towing, Rarus Railroad and Stone Container. Likewise, John Weisch testified that he regularly loans tools and equipment to Brand S, another company in Livingston. Cyroshield also borrowed tools and equipment

from LRC when it was working on a project in Livingston. Any parts, however, which were obtained from MRL or LRC were always purchased or replaced by the company acquiring the part.

18. In January of 1993, LRC decided to offer its wastewater treatment plant for sale to MRL since MRL was primarily using the plant, and LRC had decided to sell any of its "non-essential" capital assets. The sale of the wastewater treatment plant was negotiated between the President of LRC, Chuck Winnett, and the President of MRL, William Brodsky. LRC's controller, Dale McCleary and LRC's President, Chuck Winnett, both testified that they set the sale price based on the value of the improvements, the plant's tax value, and then added a profit margin to those calculations. The negotiation for the sale of the wastewater treatment plant culminated in a sale price of $145,000. Dorn Parkinson, as in other dealings between LRC and MRL, did not participate in any manner in the negotiations or sale of the wastewater treatment plant.

19. Dennis Washington has a business philosophy which he brings to each of his business ventures. Each business venture is run through a separate corporation, and each corporation must prosper or fail on its own. The president of each corporation is responsible for that success or failure. Mr. Washington does not participate in the day-to-day operations of the corporations. At the same time, it is recognized that certain necessary services, such as data processing, benefits, tax, legal, and accounting can be provided more economically if the cost is spread across a large number of companies and people. As a result, all of the companies in which Dennis Washington has an interest are able to elect to use any of the centralized services which may be available through Washington Corporations. These services are not, however, mandatory. In fact, Dale

McCleary testified that LRC is presently looking at discontinuing Washington Corp. data processing service if they can obtain such services at a less expensive rate through other providers. The costs of the services are billed to the individual companies based on the use of such services by the particular company.

20. Because Dorn Parkinson is the President of Washington Corp., he is often referred to in that position by LRC employees, despite the fact that he is actually acting as a director of LRC when he is dealing with LRC. This occasional mischaracterization can be expected when the individual identified wears several "hats". Moreover, both Roy Korkalo, and Chuck Winnett testified that they knew that Dorn was dealing with LRC as a director of LRC and not as the President of Washington Corp., and that they had not idea their "generic" references would create problems. Likewise, all of the management of LRC testified that no one, in their position as an employee of Washington Corporation, ever controlled or attempted to control the management of LRC.

21. The Plaintiffs presented various testimony to the Court suggesting that LRC employees were "supervised" by MRL. Those areas of "supervision" can best be summarized in the following categories: Quality control inspection by John Weisch and Dan Smith; Inspections by Dan Smith on prototype projects; and FRA Inspection.

Since LRC performed work for MRL on its box cars and locomotives, quality control inspections were regularly performed to insure that LRC's work performed was acceptable to MRL. These inspections were performed by both John Weisch and Dan Smith. John Weisch was the mechanical foreman for MRL at Livingston. Dan Smith was originally an assistant to John Weisch, but was later

promoted to project manager for all of Montana Rail Link. Three people were called by the Plaintiff to describe the type of "control" John Weisch exerted on MRL projects being performed by LRC: Ken Allee, Jeff Ross and Jess Ross. All three of these witnesses were former employees of LRC in the paint shop. Ken Allee testified that John "inspected" their painting, sandblasting and preparation work. Mr. Allee also testified that Mr. Weisch only spoke with his LRC supervisors and was only there two or three times a week for a short time during the MRL painting project. Jeff Ross testified that John Weisch was there only to "inspect" the MRL painting project and that if John was unhappy he would "hear about it" from his LRC supervisors, not from John. Jeff Ross also described this as a normal customer relationship. Finally, Jeff Ross, who also worked in the paint shop described John Weisch as a "representative" of MRL who spoke with LRC supervisors if there was a problem. All of these witnesses described these quality control inspections as being similar in nature to those performed by other of LRC's customers such as GE and Helm and confirmed that MRL never performed quality control inspections on any equipment other than its own. In comparing these quality control inspections to those conducted by other companies, Plaintiff Nardella noted that GE had a representative at LRC for six months and during that time the GE representative actually "instructed" them what to do.

Federal Railroad Administration ("FRA") inspections were also conducted by MRL personnel pursuant to Federal law. These types of inspections are mandated at any point where equipment is accepted by MRL at an interchange on its main line. If MRL fails to conduct these inspections, it can in some instances be fined, and is always held strictly liable for the equipment's condition once it is on MRL's main line. As a result, FRA inspections are conducted by MRL personnel, as they are by all other railroads, prior to

accepting any equipment on its main line, regardless of the equipment's ownership.

22. The final type of "supervisory" contact alleged by the Plaintiffs involved the "prototypes" developed by Dan Smith. These projects began when MRL decided to upgrade older locomotives through plans devised and created specially for these locomotives by Dan Smith. Since this was a unique experience for both MRL and LRC and was essentially a "trial and error" project, a special agreement was reached by MRL and LRC to produce these prototypes. The prototype, since it had been designed from whole cloth by Dan Smith, required his input and review from time to time. Once the prototype was finished, LRC was to place the prototype model into production and only quality control and FRA inspections would occur for the production of those remanufactured MRL locomotives. Even with the more intense involvement of Dan Smith in this project, the Plaintiffs and their witnesses acknowledged that Dan only "represented the customer" and did not perform any hands on work on the prototype project. Plaintiffs' witness Craig White, who worked on the prototype project, testified that Dan would speak to the supervisor, and the supervisor would then direct his work. Craig testified that this was the same process utilized when he was working on a BN unit. In fact, the only difference Craig could identify was that because Livingston was a small town, they knew the LRC workers and things were a "little bit more verbal." Likewise, although the Plaintiff Dennis Thorson testified that he thought that there would be "serious repercussions" if he didn't go along with the prototype directions given by Dan Smith, he acknowledged that this would be true with any customer of LRC.

None of the Plaintiffs were working on the prototypes at the time of t heir alleged injuries. In fact, none of the

Plaintiffs allege that they were under any MRL supervision at the time of their alleged injuries.

23. All of the Plaintiffs and their witnesses testified that they knew they had been hired by and worked for Livingston Rebuild Center and not MRL. Each acknowledge that their paychecks were issued by LRC; their schedules were set by LRC, and that hiring, firing and discipline was by LRC. Although Danna Parrow and Dennis Thorson testified that although they believed they were "a part of MRL", they admitted that they knew there were significant differences between the two in that MRL was unionized and LRC was not and that LRC employees had not obtained profit sharing, while MRL had. Each of the Plaintiffs also applied for workers' compensation benefits. In their application for benefits, they uniformly identified LRC, not MRL as their employer. Event after they decided to make a claim for FELA benefits, they pursued and obtained workers' compensation benefits for wages and medical bills. In fact, Dennis Thorson, Robert Watts and Danial Newman have settled their claims and have obtained lump sum settlements from workers' compensation, and will not refund those payments if successful in this suit.

24. MRL and LRC have had and continue to have an arms length "customer" relationship. Dale McCleary testified that MRL is treated like any other customer of LRC. There are billing and other disputes which are resolved by the companies through their employees, or if unresolved there, between the respective Presidents. There was no testimony which indicated that disputes had ever been mediated or arbitrated by Dorn Parkinson, who is a common director of both corporations. Another example of the arms length relationship between MRL and LRC is the competitive bidding which occurs when LRC seeks to perform work on behalf of MRL.

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Former President Sudol and Chuck Winnett both testified that they had to competitively bid for MRL's work, that they never saw another competitor's bids and that many bids given to MRL were lost. Likewise, both Sudol and Winnett testified that they were to make LRC profitable and were never instructed to bid any work for anything less than a full profit by LRC. The only advantage LRC would have for obtaining MRL bids was its close proximity. Likewise, Mel Dinius testified that he was never told where to send his equipment for repairs, only to send it where he could get it repaired at as little expense as possible.

25. The Plaintiffs called Tom Shea, a C.P.A. as an expert witness. His opinions were based on a review of the tax returns of MRL and LRC, a list of the shareholders of MRL and LRC, excerpts of selected depositions, and a small number of internal memorandums and letters. He had not reviewed anything from Washington Corporation and was not aware of how Washington Corporation was owned and controlled. Tom also did not review any of the accounting procedures nor any evidence of billing or bidding procedures between MRL and LRC.

Based on this limited information, Tom admitted that MRL and LRC were "formally" set up and maintained as separate companies, but felt they were "flexible" in their actual conduct of their business activities. Tom did not, however, find any evidence of fraud, illegality, illicit purpose, and no commingling of funds and assets. The bases for his opinion that MRL and LRC were "flexible" in the conduct of their business activities were:

a. His belief that the original transfer of the 56 acres from MRL to LRC was "without consideration" to MRL. On

cross-examination, however, Tom admitted that he was not aware under what terms MRL acquired this property; he was not aware that additional compensation was paid for the Livingston shops, and, he was unaware of the shareholder agreements.

b. The next basis was "storage" of some MRL equipment and parts without the payment of rent. He did know however, that MRL paid a portion of taxes for the warehouse, or the circumstances surrounding the allege storage of these parts and equipment. He even greed that MRL would not be expected to pay for "storage" if the equipment was on LRC's property pending LRC's use in repairing the same for MRL as its customer.

c. Tom also relied on Plaintiffs' Exhibit "10"; which is a bill from LRC to MRL requesting reimbursement from MRL for profit sharing payments made by LRC to its employees who were employed by MRL in the previous year. Tom testified that this exemplified his opinion that the companies were "flexible" in their corporate formalities and were not acting as separate corporations. Tom admitted, however, that he was unaware that MRL had reimbursed LRC for this payment. Tom was likewise unaware that the payment had to be made in this manner only as a result of a computer "glitch" which only allowed one identification number to be assigned per employee. With those additional facts, Tom agreed that this basis was no longer valid.

d. The next basis for Tom's opinion was the centralized services provided through Washington Corporation which were utilized by both MRL and LRC. Tom admitted, however, that centralization services are "not uncommon" and only show "common control" where an individual company "can't withdraw from them". On cross examination, however, Tom admitted that he was not aware

that use of these services was not mandatory but was contracted on an annual basis. Tom also agreed that regardless, the use of these centralized services would not "destroy the corporate integrity" of the companies.

e. Another basis for his opinion was his understanding that disputed billings between the companies were centrally resolved by Dorn Parkinson. Tom agreed, though, that if the testimony was that Dorn was never actually called upon to perform this function, this would remove this basis from being a part of his opinion.

f. Although Tom did not feel LRC was initially under-capitalized, he believe that LRC might not have been "sufficiently capitalized" in 1990 since its tax returns for that year showed that they were losing money. He admitted, however, that:

(1) He didn't know if in 1990 LRC was able to meet all of its payments when due;

(2) He didn't know if a large portion of the debts evidenced in 1990 were as a result of the RRB debt and lien;

(3) He didn't know if arrangements had been made with the RRB to pay this debt over time;

(4) He also didn't know if LRC had been expanding its operations during 1990, thus creating a distorted debt/income ratio.

Tom testified that any or all of those additional factors would have altered his opinion regarding the sufficiency of LRC's capitalization of 1990.

g. The next basis given by Tom in support of his expert opinion was that LRC and its president did not have the ability to determine raises. That assumption was based on an informal memorandum that actually referred to a request by the President of LRC for a change in the "wage structure" as opposed to awarding raises to particular individuals.

h. Tom also based his opinion from a reading of LRC's Safety Minutes which he believed reflected that Washington Construction Company stock was able to be offered to employees of LRC in lieu of raises. Tom admitted, however that he didn't know that such had actually occurred. Moreover, Tom was also unaware that the WCC stock was actually being "sold" on the market and the inquiry was to LRC purchasing stock to give to its employees in lieu of raises.

i. The next basis for Tom's opinion was that shareholder Levin did not receive a "distribution in lieu of his participation in the LRC transaction". However, with regard to this basis, Tom admitted that this was conjecture on his part since he didn't know whether or not Levin actually received anything; and he didn't know if there was an agreement in place with Levin regarding his participation, or lack therefore, prior to the BN acquisition.

j. The final basis for Tom's opinion was MRL and LRC's use of the "same law firm". With regard to this testimony, Tom admitted that the use of the same law firm would not destroy the corporate structure. Likewise, he also

was not aware that LRC used at least two other law firms not utilized by MRL.

26. Tom Shea did not offer any opinion to this Court regarding the relationship and corporate separateness of Washington and MRL nor regarding the relationship and corporate separateness of Washington and LRC.

27. LRC is an independent corporation furnishing rebuild services to numerous customers, including BN, GMC, Helm, MRL, Cryoshield and Maryland Midland.

CONCLUSIONS OF LAW

1. The Plaintiffs were not employees of a common carrier by Rail at the time of their alleged injuries.

All claims for FELA benefits are controlled by the act, 45 U.S.C. §§ 51-60, and by federal principles of common law. Chesapeake and Ohio R. Co. v. Kuhn, 284 U.S. 44, 46-47, 52 S.Ct. 45, 76 L.Ed. 157 (1931). Liability under the FELA is defined by 45 U.S.C. § 51, which states in its relevant part:

> Every common carrier by railroad, while engaging in commerce between any of the several States . . . shall be liable in damages to any person suffering injury while he is employed by such a carrier in such commerce . . . .

It is undisputed that LRC is not a common carrier by rail, and the Court so finds. Therefore, the Plaintiffs must prove that they were in fact "employed" by MRL. The controlling authority is Kelley v. Southern Pacific Co., 419 U.S. 318, 95 S.Ct. 472, 42 L.Ed 2d 498 (1974), which there

sets forth the three circumstances where this employment exists where the immediate employer is not a railroad:

> First, the employee could be serving as the borrowed servant of the railroad at the time of his injury. . . . Second, he could be deemed to be acting for two masters simultaneously . . . . Finally, he could be a subservant of a company that was in turn a servant of the railroad.

Id. at 324. (Citations omitted.)

Each of these theories requires "significant supervisory control" at the time of the injury. Warrington v. Elgin, Joliet & Eastern Ry. Co., 901 F.2d 88, 89 (7th Cir. 1990). The first two theories require each plaintiff to prove direct supervisory control over them at the time of injury. The third requires the plaintiff to show that LRC as a whole was under MRL's supervisory control at the time of injury. See Pelliccioni v. Schuyler Packing Company, 356 A.2d 4 (N.J.App. 1976).

The Plaintiffs have failed to produce any evidence that they were under MRL's supervisory control at the time of their injury. In fact, Plaintiffs Newman and Nardella admitted they were not even working on MRL owned equipment at the time of their alleged injuries. Ms. Parrow had no idea whether she was working on MRL equipment. All the Plaintiffs admitted that they were not being supervised by MRL at the time of their injuries. The limited testimony of alleged MRL supervision of LRC employees did not relate to time of the Plaintiffs' injuries. Whether a particular LRC employee may or may not have been supervised at one time or another is irrelevant. The critical inquiry is directed at the control which existed with

respect to a particular employee at the time of his or her injury. Warrington, supra. Therefore, the Court concludes that the Plaintiffs were not injured while directly "employed" by MRL.

The Plaintiffs have also failed to prove that LRC was the mere servant of MRL, and that they were therefore subservants (employees) of MRL. In Kelley, the Court adopted this Restatement definition of a servant:

> a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control.

419 U.S. at 324.

There is no evidence that MRL controlled the work LRC performed for other customers. The only testimony was that MRL employees occasionally gave advice on a particular problem. Advice is not control. Therefore, the subservant theory does not apply to those plaintiffs which were not working on MRL rolling stock at the time of their injuries.

Those Plaintiffs allegedly injured while working on MRL rolling stock face a similar problem. The flexible tests employed in determining whether a relationship exists allow different relationships to exist at different times. While sufficient control could exist on a particular project to create an employer-employee relationship, it may not exist on other occasions. A useful analogy is in personam jurisdiction. A non-resident entering into a single

transaction may be subject to Montana's jurisdiction with respect to that transaction. He would not, however, be subject to personal jurisdiction for other transaction lawsuits unrelated to Montana. Similarly, while supervisory control over an LRC employee may establish an employee relationship for that particular instance, it would not prove that LRC is the servant of MRL for all work performed by LRC. FELA liability is not an all or nothing proposition.

The Court finds that the Plaintiffs have failed to prove such continuous and systematic control by MRL to conclude LRC was MRL's servant for all purposes. The alleged instances of direct control are clearly the exceptions, and not the rule. The vast majority of those alleged instances involved the construction of prototype locomotives. The prototype projects, however, were a small volume of the total work performed by LRC and involved a very limited number of employees. While the MRL's involvement may arguably give rise to FELA liability under a borrowed-servant theory, it does not show such complete control over LRC to conclude that LRC was a mere servant. For every instance of control cited in conjunction with prototypes, there is evidence of MRL's complete lack of control with respect to car shop work, wheel shop work, or air room work.

In addition, many of the alleged instances of "supervision" do not rise to the level of "significant supervisory control." The following rules set forth in Kelley provide guidance:

1. The right of control must be over the activities and work being performed and the methods used by LRC employees. Mere control over the results of those activities is

not significant supervisory control. *Kelley,* 419 U.S. at 329, *quoting Chicago, R. I. & P.R. Co. v. Bond,* 240 U.S. 449, 60 L.Ed. 735, 36 S.Ct. 403 (1916)

2. Accommodations and coordination of efforts is not evidence of supervisory control. The distinction must be made between authoritative direction and control and mere suggestions as to details or necessary cooperation. *Id.* at 509.

3. Contacts between MRL and LRC must assume a supervisory character to be relevant. *Id.*

4. It is proper to consider the factors set forth in Section 220 of the Restatement (Second) of Agency in determining whether supervisory control exists.

Thus, there can be contacts, communications and coordination without creating a master-servant relationship. In addition, the customer has ultimate authority to accept or reject the end product of the vendor's services. It is only where the customer controls how the work is done that master-servant relationship exists.

Each of the Restatement factors adopted in Kelley favors a finding that LRC was not MRL's servant. Repairing and rebuilding locomotives and railcars is a distinct business, as evidenced by companies such as Morrison-Knudsen (M-K), VMV, National Railway Equipment and Chrome Locomotive. Regional railroads,

such as MRL, do not perform backshop work because they do not have enough rolling stock to justify equipping and staffing a backshop. Thus, MRL is within a recognized class of customers for contract repair shops such as LRC and M-K.

LRC provided the equipment, tools, personnel, expertise and facilities to perform the work. The jobs were generally bid on a project, rather than hourly basis. MRL did not control the details, methods, or daily activities of LRC employees. MRL would give general and brief descriptions of the work to be done, and LRC would submit a bid. LRC was expected to know how to perform the work. MRL's involvement was to ensure that the work being performed was satisfactory. Inspections were performed on work-in-progress, particularly where the work would be covered up as the project progressed. Defects were noted, and LRC was required to correct the defective work. Because of its proximity to LRC, MRL's inspections were more frequent than those performed by LRC's other customers or that MRL performed at other contract shops. The Plaintiffs acknowledged, however, that the types of inspections performed by MRL were the same as those performed by other customers. The only distinction noted was that MRL personnel were more meticulous.

The use of tools or cranes or equipment likewise does not indicate supervisory control. At the time of the injuries of any of these Plaintiffs, borrowing of tools was limited to a few specialty tools. In addition, neither LRC nor MRL was required to lend anything to the other, and requests to borrow tools were not always granted. Voluntary cooperation does not prove control. Kelley, supra.

The common ownership of MRL and LRC does not change this analysis. The numerous cases involving injuries to employees of wholly-owned subsidiaries of railroads have consistently recognized that the mere ownership of stock, or commonality of directors, does not in and of itself give rise to FELA liability. Selser v. Pacific Motor Trucking, 770 F.2d 551, 555 (5th Cir. 1985); Hopgood v. Anheuser-Busch, Inc., 458 N.E.2d 525 (Ill. App. 5 Dist. 1983); Fawcett v. Missouri Pacific Railroad Company, 242 F. Supp. 675 (1965), *aff'd* 347 F.2d 233, *cert. den.* 382 U.S. 907). Cooperation between a parent and subsidiary companies does not necessarily imply control or a right to control. Search v. Union Pacific R. Co., 649 P.2d 48, 29 (Utah 1982). Thus, the issue remains the same regardless of the ownership of the independent contractor. Unless the railroad was controlling the actions of its subsidiary or its employees, there is no basis for awarding FELA benefits. The Court finds that the directors and shareholders did not exercise significant supervisory control over the daily operations of LRC.

The Plaintiffs have acknowledged that they were not personally under the supervisory control of MRL at the time of their injuries. They have failed to prove that LRC in general was under such general supervisory control that it was a mere servant of MRL in all respects. For these reasons, the Plaintiffs have failed to prove a employer-employee relationship at the time of their injuries.

2. Section 45 U.S.C. §55 does not apply to the facts of this case.

The Plaintiffs argue that MRL's use of LRC to perform its major rebuild work violates 45 U.S.C. §55 because the net effect is that MRL avoids FELA liability. There are four reasons why this argument is untenable:

1. The United States Supreme Court has repeatedly upheld a railroad's use of independent contractors even though the net effect is the avoidance of the FELA.

2. Section 55 does not provide a basis for creating an employer-employee relationship.

3. Section 55 only applies to common carriers by rail. LRC was not created by a common carrier by rail.

4. There was no intent to avoid FELA liability.

a. Section 45 does not prohibit all transactions where the net effect is the "avoidance" of potential FELA liability.

Section 55 states in its relevant part:

> Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from liability created by this chapter, shall to that extent be void....

Section 55 specifically refers to contracts or devices the purpose or intent of which is the avoidance of FELA liability. The Plaintiffs argue that despite this clear language, they need only show that the effect of the existence of LRC is that MRL does not have to provide

FELA benefits to persons injured while repairing its rolling stock. The Plaintiffs rely solely on Philadelphia, B. & W. R. Co. v. Schubert, 224 U.S. 603, 32 S. Ct. 589, 56 L.Ed 911 (1912), for this interpretation. The Schubert decision should not be and has not been so broadly construed. In Schubert, section 55 was being applied to a contract which expressly released the railroad from liability through a relief association. These associations were routinely used to avoid liability for injuries to their acknowledged employees, and were the precise type of device prohibited by section 55. 224 U.S. at 612. The railroad argued that its contracts were entered into before the FELA was enacted and therefore could not have been intended to avoid that Act. The court refused to let the clear mandate of the statute be avoided by this argument where the contract was clearly intended to avoid liability to employees under any legislation or the common law. The court also noted that section 55 was clearly intended to apply to existing contracts. Thus, actual intent to avoid liability, under the FELA or any other theory, was clear from the operation and effect of the contract. This intent, rather than just the "operation and effect" of the contract, voided the contract. Thus not every arrangement whereby potential FELA is avoided is prohibited.

This distinction was made clear by the court's later decision in Chicago, R.I. & P. R. Co. v. Bond, 240 U.S. 449, 36 S.Ct. 403, 60 L.Ed. 735 (1916). This case involved a railroad's use of independent contractors to furnish coal for locomotives. The "necessary operation and effect" of this contract was the avoidance of FELA liability when Mr. Turner, an independent contractor, was struck and killed by a train. Nonetheless, the court held that FELA did not apply. With respect to section 55, the court held:

> We do not think that the contract can be regarded as an evasion of section [55] of the employers' liability act....
>
> Turner was something more than a mere shoveler of coal under a superior's command. He was an independent employer of labor, conscious of his own power to direct and willing to assume the responsibility of direction and to be judged by its results. This is manifest from the contract under review and from the cooperage contract; it is also manifest from his contracts with other companies to whose industries the railroad company's tracks was extended. We certainly cannot say that he was incompetent to assume such relation and incur its consequences.

36 S.Ct. at 406 (emphasis added).

The court's inquiry extended far beyond an examination of whether the "effect" of the contract was an avoidance of FELA liability, which it clearly was. Instead, the court looked at the facts to determine whether an "evasion" of FELA had occurred, thus requiring intent. Once the court concluded that Mr. Turner had not been duped into a loss of FELA benefits, or that the contract was a mere sham, it found no violation of section 55, and no entitlement to FELA benefits. If Schubert were to be read as broadly as the Plaintiffs suggest, they would have no reason to refer to "evasion" or look to motives or intent.

There are numerous other decisions which have upheld a railroad's use of independent contractors to perform work the railroad was legally obligated to perform and which is traditionally performed by railroad employees. See

Robinson v. Baltimore & Ohio R. Co., 237 U.S. 84, 35 S.Ct. 491, 59 L.Ed. 849 (1914); Edwards v. Pacific Fruit Express Co., 390 U.S. 538, 20 L.Ed 2d, 88 S.Ct. 1239 (1968) and Hetman v. Fruit Growers Express Co., 346 F.2d 947 (3rd Cir. 1965) and the cases cited therein. In each instance where independent contractors are used in place of railroad employees, the net result is an avoidance of potential FELA liability. It is clear, then, that Schubert cannot be read as broadly as suggested by the Plaintiffs, and that the Plaintiffs cannot rely on the mere fact that MRL's use of LRC "avoids" FELA liability.

This conclusion was also reached by the Fifth Circuit Court of Appeals in Selser v. Pacific Motor Trucking Co., 770 F.2d 551 (5th Cir. 1985). In Selser, the plaintiff was also arguing that his immediate employer was a mere alter ego of a common carrier by rail. The court held that this theory was only applicable to the extent that it fit within section 55. With respect to section 55 itself, the court held:

> By its terms, section 55 voids all devices, and only those devices, whose actual purpose or intent is to enable a carrier to exempt itself from liability; the comprehensive language of section 55 limits the sections applicability.

Id. at 554 (emphasis in original) Cf. Bailey v. Missouri – Kansas – Texas R.R., 732 S.W.2d 248, 251 (Mo.App. 1987), citing Selser with approval.

It is clear that the great weight of authority rejects the notion that section 55 voids all "devices" where the net effect is the "avoidance" of FELA benefits. Instead, a critical element of this statute is proof of an actual intent to avoid FELA liability.

b. Section 55 cannot be used to create an employment relationship.

The Plaintiffs have also argued that LRC is in essence a subsidiary of MRL created by MRL to perform its rebuild work, and thereby violates section 55. Assuming for now that MRL in fact created LRC, the Plaintiffs again misapply section 55. That statute applies only where an employment relationship has been proven. It cannot be used to create that relationship.

This conclusion is mandated by the language of the statute itself. In Robinson v. Baltimore & Ohio R. Co., supra, the United States Supreme Court held:

> The application of [section 55] depends on the Plaintiffs' employment, for the "liability created" by the act is liability to the employees of common carriers, and not to others; and the plaintiff was not entitled to the benefit of the provision unless he was "employed" by the railroad company within the meaning of the Act.

35 S.Ct. at 492. Thus, the Court refused to use section 55 as a means of finding an injured worker to be an employee of a railroad even though the result was the avoidance of FELA, relying instead on common law definitions of an employer and employee.

In a later case, the Fifth Circuit Court of Appeals, relying on Robinson, stated the rule as follows:

> It should be obvious at the outset that the statutory provision against devices to avoid the employers liability cannot be used to prove the existence of the legal situation – the employer-employee relationship – which calls into play both the statute creating this liability and the provision thereof which forbids any devices intended to avoid such liability. (Emphasis added)

Ward v. Atlantic Coast Line Railroad Co., 265 F.2d 75, 85 (5th Cir. 1959), rev'd on other grounds, 362 U.S. 396 (1960). This holding has been cited with approval in Turpin v. Chicago, Burlington & Quincey Railroad Co., 403 S.W.2d 233, (Mo. 1966, *cert. den.* 86 S.Ct. 1925 (1966); and Fawcett v. Missouri Pacific Railroad Company, 242 F. Supp. 675 (1965), *aff'd* 347 F.2d 233, *cert. den.* 382 U.S. 907.

In addition, there are numerous decisions involving injuries to employees of wholly owned subsidiaries which have relied solely on the employer-employee analysis, rather than Section 55. In Kelley v. Southern Pacific Co., supra, the United States Supreme Court did not even suggest that Section 55 applied even though the Plaintiff's immediate employer was a wholly-owned subsidiary of a railroad. See also Selser v. Pacific Motor Trucking, 770 F.2d 551, 555 (5th Cir. 1985); Hopgood v. Anheuser-Busch, Inc., 458 N.E.2d 525 (Ill. App. 5 Dist. 1983); Fawcett v. Missouri Pacific Railroad Company, 242 F. Supp. 675 (1965), *aff'd* 347 F.2d 233, *cert. den.* 382 U.S. 907; Search v. Union Pacific R. Co., 649 P.2d 48, 29 (Utah 1982); and Sullivan v. Consolidated Rail Corp., 459 N.E.2d 513 (Ohio 1984).

The reason is, as noted in Ward, obvious. Section 55 was enacted to prevent a specific problem, which was the

use of contracts discharging a railroad for liability for the injuries of its employees. Attempts to expand section 55 beyond this limited purpose have been unanimously rejected. See Lewy v. Southern Pacific Transp. Co., 799 F.2d 1281 (9th Cir. 1986); Bay v. Western Pac. R. Co., 595 F.2d 514 (9th Cir. 1979); and Lanfried Terminal Railroad Ass'n., 721 F.2d 254 (8th Cir. 1983) *cert. den.* 104 S.Ct. 1712.

The Plaintiffs' argument places the cart before the horse. Section 55 does not preclude the use of subsidiary corporations and independent contractors. Any intention of Congress to eliminate a railroad's right to also use such widely recognized entities must be much more clearly stated than the language found in Section 55. Section 55 only becomes relevant if the employer-employee relationship has been proven without reliance on Section 55. Section 55 does not prohibit the use of subsidiary corporations by railroads so long as the ensuing relationship does not become one of employer-employee.

c. MRL did not create LRC

Even if 45 U.S.C. § 55 creates a prohibition against the creation of subsidiaries, it only applies to the actions of common carriers by rail. This requirement is clear from the language in Section 55, which states "enabling a common carrier," and because the FELA applies only to common carriers. Dorn Parkinson, Dennis Washington and other promoters were responsible for the creation of LRC, not MRL. They pursued the railroad and rebuild facilities as separate business opportunities to be operated by independent corporations. They prepared independent business plans, investigated market potentials unique to each line of business, and obtained financing from independent sources. Dorn Parkinson, Dennis Washington

and the other promoters are not common carriers by rail. Therefore, they do not fall within the scope of section 55.[1]

d. There was no intent to avoid FELA liability.

The Plaintiffs have argued that both MRL and LRC were not legitimate corporations, and that the actions of the shareholders in starting LRC are really the actions of MRL, and vice versa. This argument would make the shareholders common carriers by rail, and therefore subject to section 55. It is interesting to note, however, that Plaintiffs' expert witness expressed no opinion on the nature of the relationship between MRL and its shareholders, and the Plaintiffs have failed to present any evidence which would require the Court to find that MRL was a mere agent or alter ego of Dennis Washington and the other shareholders.

Even assuming that MRL was not a valid corporation and assuming that Section 55 can be used to create an employment relationship, it would only do so where there is evidence of an intent to avoid FELA liability. The

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[1] There are no other prohibitions against starting a separate corporation to operate the rebuild facility. The doctrine of piercing the corporate veil certainly does not provide such a prohibition. That doctrine only applies where a corporation has been used to commit a fraud or justify a wrongful act. The Plaintiffs' only complaint is that by using a separate corporation, the workers at LRC get workers' compensation benefits rather than FELA benefits. To find a fraud or wrongful act under these circumstances would be a declaration that Montana's Workers' Compensation Act is fraud, or wrongful act. The Court is not willing to condemn the very system which our legislation has deemed adequate for all workers in the state of Montana.

Plaintiffs acknowledge that they have no direct proof that LRC was created by MRL with the intent or purpose to avoid FELA liability, and the circumstantial evidence they rely on does not support that inference.

The Plaintiffs argue that the locomotives MRL purchased from Burlington Northern were at or near the end of their useful lives and therefore would require major repairs within a very short time. By using LRC, MRL could have repairs done without exposing itself to FELA claims. Therefore, the Plaintiffs infer that LRC was started by MRL to avoid FELA liability. This argument is based on economics. The facts, however, do not support the argument.

First, the rebuild property was acquired in October of 1987 and LRC was incorporated in January of 1988. There is no evidence that at those times, MRL had any expectations or intentions of requiring major rebuilds or repairs of its locomotive fleet. Therefore, there was no need to start LRC. Mr. Dinius, Mr. Parkinson and Mr. Brodsky all testified that MRL did not expect to incur major rebuilding or repair expenses for its locomotive fleet. Each testified that the locomotives, although older models, were all inspected and found to be in good operating condition. BN agreed to perform upgrades and repairs on those locomotives which did not pass MRL muster. Of the 52 locomotives purchased, only 8 have been rebuilt. None were rebuilt in the first fifteen months of operation, and only three were built within the first 27 months.

The business plan of MRL is entirely consistent with this testimony. There were no budgeted expenditures for major repairs or rebuilds of locomotives. The only evidence presented by the Plaintiffs touching on the needs for rebuilding of locomotives is a budget proposal prepared

by Mel Dinius requesting funds for the rebuild of 72 locomotives over a five-year period, beginning in 1989. That document was drafted eight months after the formation of LRC and did not request any rebuilds until the next year. More importantly, that proposal never came to pass.

The facts also fail to support the conclusion that the most economical means of maintaining MRL's locomotives was to open a backshop. A railroad which has an aging fleet has several options available to it. It can purchase new locomotives, purchase used locomotives, obtain the facilities to do the major repairs itself, or use contract shops to perform the work. It is uncontested that MRL did not have the facilities to perform major rebuild work.[2] The Livingston facility was not in operating condition. In fact, the buildings had been stripped. LRC invested approximately $2,000,000 and months of time to get the repair shop operational. There is no evidence that this huge financial undertaking made economic sense, and certainly no evidence to suggest that MRL believed it made economic sense. MRL did not have a sufficiently large fleet to support the Livingston facility whether MRL ran the shop or created LRC to run the shop. It was not economical for MRL to open the backshop to perform its repairs.

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[2] The fact that MRL did not have a backshop is not unusual, nor was it an insurmountable problem. The testimony of Mr. Dinius and Mr. Brodsky was that most regional railroads do not have a sufficient amount of rolling stock to justify equipping and operating a backshop. Instead, they rely on the numerous contract shops throughout the United States, such as VMV, Chrome Locomotive, and National Railway Equipment.

The argument that MRL had to open the backshop through LRC to avoid the RRA and FELA also fails to take into account the existence of other contract shops. Those shops were not subject to RRA or FELA, and could also be used to "avoid" FELA. In fact, Morrison-Knudson apparently charged a lower hourly rate than LRC. The only cost savings that LRC would have over these other shops is transportation costs. The testimony shows that these transportation costs would be far less than even the original $2,000.000 investment in LRC, even if all 72 locomotives were rebuilt elsewhere.

Finally, there is no evidence that MRL believed FELA created a significant exposure. The potential cost of FELA liability is offset by the cost of workers' compensation coverage. There is no evidence that MRL had any estimates of what FELA costs might be. The exhibit showing BN's loss history for FELA claims, gives no indication that it is relevant to the FELA costs associated with a rebuild facility where neither the Boiler Inspection Act nor Safety Appliance Act apply. The Livingston shop was closed prior to the dates in that exhibit. There is also no indication on the exhibit of the total number of employees on the Huntley to Sandpoint line.

In summary, there is no evidence that opening the shop was the most economical means for MRL to perform repairs, and no basis to infer that the shop was opened by MRL to save money.

The Plaintiffs also rely heavily on certain real estate transfers to show MRL created LRC to avoid FELA liability. When LRC was incorporated in 1988, the property on which LRC is now located was transferred by MRL to LRC without payment of consideration. In the fall of 1988, a portion of that property consisting of

approximately five acres was transferred back to MRL. This transfer included a portion of the backshop which contained the small drop pit. A relocation survey relating to these five acres was undertaken in October of 1988. Again, there was no consideration for this transfer.

The Plaintiffs argue that the land transferred to LRC had significant value and therefore MRL's failure to require LRC to pay for the land shows the corporations are really one and the same. The Plaintiffs did not, however, submit any evidence showing the market value of the property. The tax assessment records submitted by the Plaintiffs do not indicate how the property was assessed for tax purposes or whether the tax value in fact reflected market value. The exhibits showing valuations established for insurance purposes are based on replacement cost, rather than market value. Neither evaluation takes into account the condition of buildings at the time of sale, the limited use for buildings of that nature, the investment needed to make the buildings useable, or the potential liability created by the presence of hazardous wastes on the property. For these reasons, the Court has no basis for concluding that MRL gave away valuable property.

In addition, the undisputed testimony is that MRL obtained the facility from BN without any additional consideration and that MRL only obtained title to the backshop as a convenience to the shareholders. The shareholders of MRL agreed in advance that this property, to the extent it was not needed for MRL's operations, would be conveyed out of MRL. MRL had no intention of operating a backshop for its own purposes or for other railroads. Its union affiliation would have precluded MRL from obtaining BN's repair work, thereby eliminating the largest customer in the region. Therefore, MRL did not incur any loss from the transfer.

The later transfer of the five acres to MRL was also done with the consent of all shareholders for the mutual benefit of the two corporations. MRL retained title to the majority of the running repair shop, and the drop pit was most beneficial to MRL. When considered in light of all other evidence, these transactions are not sufficient to infer an intent to avoid FELA benefits.

The Plaintiffs have also argued that MRL exercises such extensive control over LRC and the lack of separateness of the two corporations renders LRC a mere division of MRL. The suggested inference is that LRC is a sham, created to avoid FELA liability. The evidence, however, is to the contrary.

Although the officers of LRC at its incorporation and the officers of MRL at its incorporation were identical, the presidents who are responsible for the day-to-day operations of LRC and MRL have never been the same. MRL and LRC have maintained all corporate formalities. They issued shares of stock, held regular meetings of the board of directors and shareholders, filed separate tax returns, and generally conducted business as a corporation. There has been no commingling of funds between LRC and MRL or any other Washington Company. Since its inception, LRC has obtained its own financing, borrowed money in its own name, maintained its own bank accounts, payroll, accounts receivable, accounts payable and bookkeeping system. MRL, Washington Corporations[3] and

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[3] Plaintiffs cite to a newsletter which suggested that Washington Corporation provided financial assistance to LRC. The author of that newsletter and all other witnesses have testified that that statement was incorrect. The Court

the other Washington Companies have never loaned money to LRC, guaranteed its obligations or made capital contributions to LRC.

The Plaintiffs have also argued that LRC was not adequately capitalized. Their own expert, Mr. Shea, acknowledged that although he felt LRC was currently insolvent, he acknowledged that the initial capitalization was adequate. Undercapitalization is only relevant to show that a corporation could not have been operated as a separate entity and thus was a mere sham when it was created. It is not enough to show that the corporation later became insolvent. Scott v. AZL Resources Inc., 753 P.2d 897, 901 (N.M. 1988), Nantan Bagona, Ltd. v. Scalia, 577 P.2d 725, 729 (Co.App. 1978); Am.Jur.2d Corporations § 49 p. 52 (1985). There is no evidence that LRC has ever been unable to meet its obligations, and there have been considerable additional loans and capital contributions by the shareholders. Financially LRC was not a mere sham.

The Plaintiffs also presented extensive testimony that MRL and LRC occasionally loaned tools to each other. This does not show a lack of separateness between LRC and MRL. Both MRL and LRC have spent significant amounts of money for the purchase of tools and equipment, and there is no commonly owned "pool" of tools. The ownership of the tools and equipment is clearly understood by both MRL and LRC employees. Neither corporation has the right to borrow tools from the other, and requests to borrow tools are not always granted. All tools must be returned to the owner. Borrowing tools is apparently common in the industry among corporations with no similar shareholders.

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finds the in-court testimony more compelling than one sentence in an informal newsletter.

The Plaintiffs also rely on MRL's "right" to select which LRC employees would work on their equipment. Such requests were extremely limited and requests for the removal of an employee whose work or attitude was unsatisfactory does not prove control or domination. Zarate v. Brownsville Nav. Dist., 768 S.W.2d 393, 398 (Tx. App. 1989). All customers have that right, and LRC would concede to such requests by any customer, not just MRL.

The Plaintiffs also cite to LRC's use of the centralized services of Washington Corporation (Corp.) as showing domination of LRC by MRL and therefore supports an inference that LRC was a sham. The Plaintiffs' own expert, however, acknowledged that the use of companies such as Corp. is not uncommon. The sole reason Mr. Shea felt that it showed a lack of independence was his erroneous belief that use of Corp. was mandatory. The evidence was that LRC was not obligated to use Corp., but did so when it was the most economical means of obtaining a service. Finally, Corp.'s alleged control over LRC does not prove control by MRL. There is no evidence that Corp. and MRL are one and the same and no evidence that Corp. exercised any control over MRL. Without this link, the Plaintiffs cannot show control over LRC by MRL.

The Court's conclusion that LRC's and MRL's use of the services offered by Washington Corporations does not show control is well supported by other decisions. For example, in Hopgood v. Anheuser-Bush, Inc., 458 N.E.2d 525 (Ill. App. 5 Dist. 1983), the corporate structures at issue were similar to those present in the instant case. The Plaintiff worked for St. Louis Refrigerator Car Company (SLRC), a wholly-owned subsidiary of Anheuser-Bush, Inc. (Busch). SLRC maintained, repaired, rebuilt and leased railroad cars. One of SLRC's customers was

Manufacturer's Railway Co. (MRC), another wholly-owned subsidiary of Busch. SLRC and MRC had the same comptroller, shared accounting functions, used the same legal department, and filed a joint tax return. These factors, and others, were held to be insufficient to show that MRC and SLRC are one and the same.

Similarly, in Search v. Union Pacific R. Co., 649 P.2d 48 (Utah 1982), the plaintiff was a carman for Union Pacific Fruit Express (UPFE), a wholly-owned subsidiary of the Union Pacific Railroad (UP). UPFE offered and repaired refrigerator railcars. The facts showed a much closer relationship between UP and UPFE than present in the instant case. The following facts were not considered evidence of control:

1. The UP law department offered services to UPFE.

2. UPFE was described by UPPE as "part of the Union Pacific family."

3. The corporations had the same health and dental plan.

4. UPFE employees could use the UP hospital.

5. Employees of both corporations had in certain circumstances "bump rights" against employees of the other corporation.

The Plaintiffs have also suggested that the Court should be aware of devices intended to avoid FELA. The

Court must also take care to avoid the extension of FELA liability beyond the bounds of the Act. As one court has noted:

> The court should be alert to avoid the extension of a statute applicable to railroad employees in interstate transportation to cover those engaged in other occupations. Such an extension may only serve to deprive injured workers of their rights under a state compensation act where their right of recovery does not depend on proof of negligence. *Turpin v. Chicago, Burlington, & Quincy Railroad Co.*, 403 S.W.2d 233, 240 (Mo. 1966).

This concern is particularly keen here, where the Court is being asked to extend FELA liability to a rebuild center. Neither the Boiler Inspection Act nor the Railway Safety Act apply to equipment being repaired. New York, C., & St. L.R. Co. v. Kelley, 70 F.2d 548 (7th Cir. 1934). Those Acts provide for strict liability for violations, and represent a major component of FELA liability. Accordingly, there is less incentive to stretch the remaining portions of the Act to LRC.

There is no proof, either direct or circumstantial, that MRL created LRC to avoid FELA liability. Therefore, Section 55 does not apply.

3. There is no basis for disregarding the corporate entity of LRC.

In addition to the FELA issues, the Plaintiffs have asked the Court to pierce the corporate veil of LRC. There

are two recognized theories used to pierce the corporate veil. Under the first, the alter ego theory, the Plaintiffs must show that the corporate affairs of each corporation have become so entwined that, in effect, each no longer has a separate identity. Hando v. PPG Industries, Inc., 236 Mont. 493, 498, 771 P.2d 956 (1989). The second, the "agency theory", requires the Plaintiffs to show that for a given transaction, one corporation exercises such control over the conduct and activities of the other that the one is merely acting on behalf of the other. Id. Under either theory, the Plaintiffs must also show that LRC was used to defeat public convenience, justify wrong, perpetrate fraud, or defend crime. Id. See also N.L.R.B. v. Fullerton Transfer & Storage, 910 F.2d 331 (6th Cir. 1990) (Applying federal common law).

There is some question of whether these theories can be used in conjunction with an FELA suit. These theories are, however, essentially the same as those discussed above. The Court has already concluded that LRC and MRL have separate corporate entities, thus eliminating the "alter ego" theory. Second, the Court has already concluded that LRC is not a "servant" of MRL under 45 U.S.C. 51. For the same reasons, the Court concludes that LRC was not the mere "agent" of MRL under corporate veil theories. Matters such as the loans of tools and equipment, the use of the same air compressors and utilities, and common insurance do not show domination or control. Such cooperation among related companies is clearly permissible and does not destroy the separateness of the two corporations. Finally, the requirement of an improper motive in the use of a corporation renders these common law theories the equivalent of a theory based on 45 U.S.C. 55. The only improper motive the Plaintiffs have

identified is the alleged avoidance of FELA.[4] There is no proof of such an intent.

4. The Effect of the Railroad Retirement Act decision.

The Plaintiffs argue that the determination that LRC is subject to the Railroad Retirement Act (RRA) is decisive on FELA jurisdiction. See Livingston Rebuild Center, Inc. v. Railroad Retirement Board, 970 F.2d 295 (7th Cir. 1992). Plaintiffs argue that the Seventh Circuit determined that LRC was under "common control" with MRL, and that decision is binding on this Court. After reviewing that decision, the Court disagrees.

The controlling legal principle is the doctrine of collateral estoppel, which prevents the relitigation of issues which have already been decided. In order to apply this principle, however, there must be an identity of issues in the present and previous litigation.

> Of the three elements of collateral estoppel, the identity of issues is the most crucial....In order to satisfy this element, the identical issue or "precise question" must have been litigated in the prior action

---

[4] The Plaintiffs have suggested that LRC was also used to avoid the Railroad Retirement Act (RRA), which adds certain taxes to both the employer and employee. There is no statutory or common law prohibition, however, against avoiding coverage by the RRA. Such efforts are no different than taking advantages of tax shelters to "avoid" paying income tax. *Livingston Rebuild Center v. Railroad Retirement Board,* 970 F.2d 295 (7th Cir. 1992).

Anderson v. State, 250 Mont. 18, 21, 817 P.2d 999 (1991).

Here, there is no identity of issues. The issues in this case are whether the Plaintiffs were employees of a common carrier by railroad at the time of their injuries and whether the creation of LRC was a "device" intended to avoid FELA liability. The issue presented to the Seventh Circuit involved different statutory language and definitions. Under 45 U.S.C. § 231, the RRA applies to any "employer" as that term is defined by that Act. An "Employer" is:

> (i) any express company, sleeping car company, and carrier by railroad, subject to subchapter I of chapter 105 of Title 49;
>
> (ii) any company which is directly or indirectly owned or controlled by, or under common control with, one or more employers as defined in paragraph (i) of this subdivision, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation or equipment or facilities) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad....

This definition of an employer only requires common ownership or common control with a railroad. Thus, "control" is not even a requirement under the RRA. To the extent control is a part of the RRA definition, the requirements of control are much less stringent under the RRA:

> A company or person is controlled by one or more carriers whenever there exists in one or more such carriers the right or power by any means, method or circumstance, irrespective of stock ownership to direct, either directly or indirectly, the policies and business of such a company or person and in any case in which a carrier is in fact exercising direction of the policies and business of such a company or person.

20 C.F.R. 202.4

The RRA only requires the mere right to direct policy and business. The FELA requires an employment relationship evidenced by significant supervisory control over the actual activities and work being performed. It is clear that "precise questions" presented here are significantly different and were not decided by the Seventh Circuit. The RRA is a different statute, with a different definition of an employer and with a significantly broader definition of control. The question of whether LRC is subject to FELA must be decided under the FELA and the cases applying the FELA. The RRA has no place in that analysis.

The Plaintiffs also argue that because LRC is subject to RRA, it must also be subject to FELA because the two Acts work hand-in-hand. The Plaintiffs argue that the Railroad Retirement is funded through liens against FELA recoveries, and therefore one cannot exist without the other. The simple answer to this argument is that there are numerous industries which are subject to RRA which are not subject FELA. For example, 45 U.S.C. § 231(a), defines those "employers" subject to the RRA, to include

refrigerator car companies and sleeping car companies. Despite acknowledging the fact that refrigerator car companies were expressly covered by the RRA, the United States Supreme Court unanimously held that refrigerator car companies were not subject to FELA. Edwards v. Pacific Fruit Express Co., 390 U.S. 538, 88 S.Ct. 1239, 20 L.Ed 2d. 112 (1968). There, the Court noted that Congress has amended the RRA to specifically include refrigerator car companies but expressly refused to make similar amendments to the FELA. The RRA was also amended to specifically extend coverage to sleeping car companies, but again a proposed amendment to add sleeping car companies to the FELA was defeated. That proposed amendment occurred after and was a response to a United States Supreme Court decision holding that employees of sleeping car companies were not entitled FELA benefits. Id.

It is clear that there is no Congressional mandate that an employee covered by RRA must also be covered by the FELA. Over the years, the scope of those employers subject to the RRA have been expanded dramatically. The scope of the employers subject to the FELA has remained unchanged. The result is that an employer can easily be subject to RRA without being subject to FELA. If FELA is truly intended to be a means of funding RRA, then it is up to Congress to pass legislation to achieve this intent. As the laws are written now, however, there is no basis for reaching such a conclusion.

SUMMARY

For the foregoing reasons, the Court concludes that the plaintiffs are not entitled to FELA benefits. Defendants shall prepare an appropriate judgment.

DATED this 29th day of September, 1993.

/s/ Kenneth R. Wilson
District Judge

Supreme Court, U.S.
FILED
OCT 27 1999

No. 99-534

In The

Supreme Court of the United States

MONTANA RAIL LINK, INC.,

Petitioner,

v.

ROBERT R. WATTS, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Montana

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the test for determining "employment" under the Federal Employers' Liability Act [45 U.S.C. § 51 (1939)] should be judicially expanded to include the distinct congressional standard utilized for establishing "employment" under the Railroad Retirement Act [45 U.S.C. § 231 (1976)].

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STATEMENT OF JURISDICTION

Plaintiffs (Respondents herein) filed complaints in the District Court for the Sixth Judicial District in Park County, Montana, in which they named Livingston Rebuild Center, Inc., and Petitioner Montana Rail Link, Inc., as defendants, seeking damages pursuant to the FELA, 45 U.S.C. §§ 51-60 (1939). The district court entered judgment in favor of MRL on September 30, 1993, and its decision is reprinted as Appendix 3 to the Petition.

The decision of the Montana Supreme Court was entered on February 8, 1999. On April 22, 1999, the Montana Supreme Court denied MRL's Petition for Rehearing. LRC did not join the Petition for Certiorari to this Court.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

I. STATEMENT OF THE CASE

Each of the six Plaintiffs brought independent actions pursuant to the Federal Employee's Liability Act [hereinafter FELA], 45 U.S.C. §§ 51-60, to recover damages for injuries sustained while working for Defendant Livingston Rebuild Center. All six cases were consolidated for determination of the common issue of whether the Plaintiffs were entitled to bring FELA actions against the Defendants. The issue was tried in the Sixth Judicial District Court, Park County, Montana, before the Honorable Kenneth Wilson, sitting without a jury. The District Court entered Findings of Fact and Conclusions of Law in favor of Defendant Montana Rail Link, Inc., and Defendant Livingston Rebuild Center, Inc.

On appeal, the Montana Supreme Court reviewed the factual evidence in detail and reversed the District Court, holding that the employees were, in fact, subservants of Montana Rail Link under the test established in *Kelley v. Southern Pacific Co.*, 419 U.S. 318 (1975), and therefore entitled to FELA coverage. The Montana Supreme Court held that there was no arms-length relationship between the two sister corporations, Livingston Rebuild Center did not function independently, and Montana Rail Link controlled the work and operation of Livingston Rebuild Center. *Watts, et al. v. Montana Rail Link, Inc.*, Appendix 1 to Petition, 1999 MT 18, ¶ 63, 975 P.2d 283, ¶ 63 (1999). Petitioner Montana Rail Link subsequently filed a 30-page petition for rehearing with the Montana Supreme Court challenging each factual finding in great detail. After review, the Montana Supreme Court denied the petition for rehearing. Petitioner Montana Rail Link now files a Petition for Writ of Certiorari to the United States Supreme Court. This case is limited to six workers who were injured at the Livingston Rebuild Center in Livingston, Montana, between its formation in January 1988, and its sale to an independent owner in May 1993. *Watts*, ¶ 65.

In 1883, the Northern Pacific Railroad built shops in Livingston to maintain and repair its locomotives and rail cars operating in the region. (Tr. 658.) For over 100 years, the workers in the Livingston shops worked directly for the Northern Pacific Railroad and its successor, the Burlington Northern Railroad. (Tr. 659.) They were railroad workers entitled to federally mandated railroad benefits.

In 1987, Dennis Washington and a small group of minority shareholders leased Burlington Northern's

southern line from Laurel, Montana, to Sandpoint, Idaho, and purchased in fee simple all of Burlington Northern's branch lines, rail yards, and repair facilities on that route. (Tr. 526-27.) The purchase included all of the Livingston shops along with several adjoining properties. (Tr. 546.) After that time, the workers in the Livingston shops were no longer entitled to railroad benefits because Dennis Washington and the other shareholders formed one corporation, Montana Rail Link [hereinafter MRL], to operate the railroad and a second corporation, Livingston Rebuild Center [hereinafter LRC], to operate the heavy repair shops. Many of the same workers continue to perform the same work in the same shop, but without FELA benefits. (Tr. 90-91, 664.)

Between the time that LRC was formed in January 1988 and its sale in May of 1993, the two companies shared common ownership and control. As the Montana Supreme Court found:

> . . . of the 32 shareholders who invested in MRL, 31 invested in LRC and constituted all of LRC's owners. The Dennis Washington Trust owned 79% of the stock in MRL and 78.49% of the stock in LRC.

Watts, ¶ 24. MRL recognized that it was cheaper to have all of its major repair work done by an independent contractor, such as LRC. Railroad workers were unionized workers, therefore, entailing higher costs in wages and retirement benefits. By having the work done by LRC, an allegedly independent contractor, MRL derived a 37% reduction in labor expenses. *Watts*, ¶ 23.

It is uncontested that each of the workers in this case was injured during his or her nominal employment with LRC. Following their injuries, they brought independent actions against MRL and LRC on grounds that they were entitled to FELA benefits like their predecessors who worked for Northern Pacific Railroad and Burlington Northern Railroad.

During the five-year time period at issue, the Boards of Directors for both MRL and LRC were chaired by the same individual. For part of that period it was the primary shareholder, Dennis Washington. *Watts*, ¶ 25. As the primary shareholder in both corporations, Dennis Washington had the right to choose the Board of Directors and officers of both corporations. He, thereby, effectively exercised exclusive control over both corporations. *Watts*, ¶ 27.

The Montana Supreme Court, in its detailed review of the facts, found that Dennis Washington and MRL's supervisors exercised direct control over the LRC employees. The MRL railroad and the LRC repair shops occupied the same building. *Watts*, ¶ 40. LRC employees performed work under the direct supervision of MRL supervisors. *Watts*, ¶¶ 42-53. Even the President of LRC acknowledged that there were occasions where MRL supervisors directed the work of LRC employees. *Watts*, ¶ 50. Not only did the MRL and LRC employees work in the same building, there was also a common exchange of tools, equipment and parts for railroad locomotive repair. *Watts*, ¶¶ 56, 57. MRL used LRC's property to store its equipment, railroad cars and locomotives without compensating LRC. *Watts*, ¶ 59.

In addition, LRC was required to convey significant amounts of real estate and operation facilities to MRL without compensation, or for less consideration than full market value. The common vice president of both corporations signed the property transfers as both vice president of MRL and vice president of LRC. (Tr. 555, 1163; Plaintiffs' Exh. 1, Quit Claim Deed, Jan. 4, 1988.) LRC was forced to give up valuable real estate and property to fulfill the needs of MRL including a part of LRC's shop facilities, four acres of real estate, a trailer park, a lumber yard, and a waste water treatment plant. *Watts*, ¶¶ 35-37. It is undisputed that the transfer of real estate to MRL was done without consideration. The Montana Supreme Court concluded these undisputed facts were "strong evidence of MRL's control over LRC." *Watts*, ¶ 39. The Montana Supreme Court also found that the principal owner and chairman of the Board of MRL "controlled virtually every significant detail of LRC's financial operation." *Watts*, ¶ 61.

The Montana Supreme Court, after extensive review of the facts, held that a master-servant relationship existed between MRL and LRC:

> . . . by not only the common control of MRL and LRC through its ownership and directorship, but also MRL's direct, frequent, and unique supervision of LRC's employees; MRL's at-will acquisition of LRC's property when acquisition was in MRL's self-interest; LRC's dependence on MRL for training, tools, equipment and parts; and MRL's use of LRC's property for its own purposes without compensation to LRC.

Watts, ¶ 65.

II. REASONS FOR DENYING THE WRIT

A. The Question Presented is Misleading.

Reading the question presented would lead one to believe that the Montana Supreme Court equated "employment" for purposes of the Railroad Retirement Act with "employment" under the Federal Employers' Liability Act. The conclusion is wrong. The question presented misstates the law, facts, and issues decided.

The Petitioner's question presented mischaracterizes the nature and importance of the Montana Supreme Court's decision in this case. The Montana Supreme Court did not judicially expand the test for employment under FELA and it did not equate employment under the Railroad Retirement Act with employment under FELA. Rather, the Montana Supreme Court simply acknowledged that the control of a subservant business by a railroad is one appropriate factor for consideration in determining employment under both the Railroad Retirement Act and FELA. The more appropriate question for this Court's consideration is: When a court considers the element of control as one factor in its determination of employment under FELA, and such factor happens also to be an appropriate consideration in determining employment under the Railroad Retirement Act, should the U.S. Supreme Court grant certiorari to review the lower court's fact-driven analysis?

MRL also attempts to portray a split of authority among the lower courts where none actually exists. The Montana Supreme Court's decision in this case was a fact-driven decision based on unique circumstances existing between two closely related corporations. MRL has

pulled out a single minor issue and attempted to create a significant federal question where none exists.

B. The Standard for Review Is Not Met.

The United States Supreme Court does not ordinarily grant a petition for writ of certiorari to review evidence and discuss specific factual findings. *United States v. Johnston*, 268 U.S. 220, 227 (1925); *National Labor Relations Board v. Waterman S.S. Corp.*, 309 U.S. 206, 207 (1940). A petition of certiorari is not granted to merely review evidence or the lower courts' inferences drawn from that evidence. *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, 178 (1938). Rather, Rule 10 of this Court's Rules allows for review of a writ of certiorari for compelling reasons such as: where the United States Court of Appeals enters a decision which conflicts with a decision of another U.S. Court of Appeals on the same matter; or a state court "has decided an important federal question in a way that conflicts with the decision of another state court of last resort or a U.S. Court of Appeals"; or where a state court has "decided an important federal question in a way that conflicts with relevant decisions of this court." The Rule further provides that a petition for a writ of certiorari is infrequently granted when the asserted error "consists of erroneous factual findings or the misapplication of a properly stated rule of law." U.S. Sup. Ct. R. 10.

Respondents contend that the Montana Supreme Court's decision was fact-driven and the Court properly applied the law, but even if it did not, it does not warrant

the granting of a writ of certiorari. The Petitioner's argument is at best that the Montana Supreme Court misapplied the law. Even the dissent in the underlying opinion recognizes that the majority correctly stated the applicable law. There is no split of authority on this issue. All of the courts generally agree as to the controlling law. The Montana Supreme Court also agreed and applied the controlling law to the specific facts of this case. As shown below, the Petitioner does not meet the standards for granting a writ.

C. The Montana Supreme Court Did Not Rely upon the Railroad Retirement Board's Decision.

MRL's petition significantly misstates the Montana Supreme Court's application of the law in this case. The Montana Supreme Court did not, as MRL contends, rely upon the Railroad Retirement Board's decision in concluding that the LRC employees were entitled to FELA coverage. To the contrary, the Montana Supreme Court found that some of the factors considered by the Railroad Retirement Board in assessing employee status are also factors that are appropriately considered in determining whether an employee is under the control of the railroad. As the Montana Supreme Court noted, the Railroad Retirement Act statutorily defines the term "employer." It includes companies that are owned and controlled by a railroad. The Court specifically noted that the standards for defining an employee under the Railroad Retirement Act and under FELA are distinct. However, they do share some common elements. The common element considered by the Montana Supreme Court was control over one or more of the employees by a railroad. *Watts*, ¶¶ 28-30.

The Montana Supreme Court did not rely entirely or even primarily upon the findings of the Railroad Retirement Board and the Seventh Circuit Court of Appeals in reaching its decision that the Respondent employees were covered by FELA. The Court specifically noted that the decisions of the Railroad Retirement Board and the Seventh Circuit were not controlling:

> While we do not conclude that the decision of the Railroad Retirement Board or the Seventh Circuit Court of Appeals is dispositive of the issue in this case, we do think that the Board's finding that LRC was under the control of the principals of MRL is probative of the issue in this case. In addition, there was other undisputed evidence of the practical ways in which MRL's control over LRC was manifested.

Watts, ¶ 33. The Montana Supreme Court found that the Railroad Retirement Board decision was not dispositive of the issues, or controlling of the outcome of the case. Instead, it found that one of the factors included in the Railroad Retirement Board's decision, that of control, was a common factor in the determination of employment under the Federal Employer's Liability Act and the Railroad Retirement Act.

Control of LRC by MRL principals was probative. Black's Law Dictionary defines probative in an evidentiary sense as having a tendency to prove or contribute toward proof. Control of a supposedly independent corporation by a railroad is a factor in a subservant analysis under the *Kelley* test. This case, and others applying *Kelley*, recognize the importance of control of companies and their workers by a railroad in determining whether

workers can establish employment with a railroad for purposes of FELA. *See, e.g., Kottmeyer v. Consolidated Rail Corp.*, 424 N.E. 2d 345, 352 (Ill. App. Ct. 1981) (control of performance and manner of work, degree of control or supervision, as well as the right to control the employee's activities meets definition of "servant" in support of *Kelley*); *Warrington v. Elgine, Joiliet & Eastern Railway Co.*, 901 F.2d 88, 90 (7th Cir. 1990).

Servant and subservant relationships depend upon control by a master. The Montana Supreme Court simply recognized the common sense fact that the Railroad Retirement Act also includes the common element of control. Greater analysis was made in this case by the Montana Supreme Court to determine that the Respondents served a corporation which was in turn a servant of a railroad. Obviously, receipt of Railroad Retirement coverage is broader than FELA coverage. Railroad Retirement coverage depends on common ownership and control, whereas, FELA coverage depends on direct control. While employment for FELA purposes is narrower than Railroad Retirement, they do share the common element of control by a railroad.

In addition to the finding of control by the Railroad Retirement Board, the Montana Supreme Court recited a plethora of factual evidence for finding that MRL exercised control over LRC and its employees. Sixty of the seventy-four paragraphs in the opinion were devoted to specific factual findings showing MRL's control over LRC and its employees. Therefore, the Petitioner's argument concerning the Montana Supreme Court's reliance upon the Railroad Retirement Board's decision mischaracterizes the law, the Montana Supreme Court's decision and

the facts of this case. The Petition should be denied on these grounds alone.

D. There Is No Split of Authority.

The Petitioner attempts to create grounds for certiorari by alleging that there is a split among the courts concerning the factors to be applied in determining whether there is FELA coverage. There is, however, no split of authority. It is generally agreed by this Court, the Circuit Courts of Appeal, the State Supreme Courts and the Montana Supreme Court, that the test which this Court set forth in *Kelley v. Southern Pacific Co.*, 419 U.S. 318, 324 (1975) controls the issue of determining employment status. The Montana Supreme Court carefully pointed out the controlling law, and followed that controlling law in this case. *Watts*, ¶¶ 5-6.

The Petitioner cites a number of cases for the proposition that a determination of employment for purposes of the Railroad Retirement Act is not controlling for FELA purposes. (Petitioner's Brief, pp. 10-12.) We agree. This Court, other jurisdictions and the Montana Supreme Court agree that a Railroad Retirement Board decision of employment is not determinative under FELA.

The Petitioner argues that the Montana Supreme Court's decision is at odds with other jurisdictions including this Court's holding that it is inappropriate to rely upon the findings of the Railroad Retirement Board. There is, however, no conflict in these decisions since the Montana Supreme Court did not rely upon the Railroad Retirement Board's decision but, instead, merely noted

that there is a common element of control under both the Railroad Retirement Act and the Federal Employer's Liability Act.

The Petitioner contends that the Montana Supreme Court's alleged reliance on the Railroad Retirement Board's decision conflicts with *Edwards v. Pacific Fruit Express Company,* 390 U.S. 538 (1968). Such contention is a misstatement of the law. In *Edwards,* the sole issue was whether a company that leased refrigerator cars to railroads performed enough railroad functions to be considered a "common carrier by railroad" for purposes of FELA. *Edwards,* 390 U.S. at 540. After review of pertinent legislative history, this Court concluded Congress intended to exempt refrigerator care companies from FELA coverage. *Id.* at 542. The *Edwards* decision did not deal with control of employees or companies by a railroad and the decision contains no discussion of the Railroad Retirement Act as evidence of FELA coverage. It merely noted legislation was passed to include refrigerator car companies under the Railroad Retirement Act. Petitioner misstates the law when it contends *Edwards* is in "direct conflict" (Petitioner's Brief, p. 9) with the Montana Supreme Court's decision.

Equally disingenuous is the contention that the *Watts* decision conflicts with other court decisions. The cases cited by Petitioner including *Brankin v. CSC Transportation, Inc.,* 1996 WL 627625 (N.D. Ill. 1996); and *Dixon v. CSX Transportation, Inc.,* 990 F.2d 1440 (4th Cir. 1993), did not involve the common element of "control" of employees and companies by a railroad. The Petitioner's argument that the Montana Supreme Court's reliance

upon the Railroad Retirement Board decision is at odds with other courts is merely a straw man argument.

E. The Montana Supreme Court's Decision is Limited.

The Petitioner argues that "as a result of the court's use of the Railroad Retirement Act finding in the context of FELA is to potentially subject every railroad in America with wholly owned subsidiaries to a plethora of FELA suits from employees who are otherwise covered under the states' respective Workers' Compensation Acts." (Petitioner's Brief, p. 12.) The Petitioner's use of hyperbole is unwarranted and incorrect. The Montana Supreme Court's decision is specifically limited to Montana. Furthermore, the Montana Supreme Court made it clear that its holding applies only to the six workers under the unique circumstances of control of LRC during the period between 1988, its inception, and 1993, when the LRC was sold to a third party who may not be subject to the control of MRL. The status of any other workers under any other circumstances were not before the Montana Supreme Court and are not subject to its decision. MRL is the only railroad based in Montana. Even if all factual and legal implications are taken in favor of the Petitioner, the Montana Supreme Court's decision carries little, if any, weight outside of its jurisdiction.

III. CONCLUSION

The Montana Supreme Court's decision in this case was a fact laden determination of limited scope and

impact. The question presented mischaracterizes the law, the facts considered, and the court decision below. There is no split of authority within the federal courts or state courts. Even if the Montana Supreme Court misapplied the correct test, it is not grounds to grant a writ of certiorari. The Petitioner fails to meet the standards for granting a petition for writ of certiorari.

Thus, Respondents respectfully request the Court to deny Montana Rail Link's Petition for Writ of Certiorari to the Montana Supreme Court.

RESPECTFULLY SUBMITTED this 27th day of October 1999.

BECK & RICHARDSON, P.L.L.P.

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